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Supreme Court of the United States

OCTOBER TERM, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATRIX OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED, PETITIONER,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, A DOMESTIC CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1950.

CERTIORARI GRANTED NOVEMBER 6, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND

CIVIL ACTION No. 1023

VIOLA HALL MOORE, Administrator of the Estate of LOUIS LEE MOORE, JR., deceased, Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Defendant

COMPLAINT—Filed July 18, 1949

1. Plaintiff has duly qualified and is now acting as administrator of the Estate of Louis Lee Moore, Jr., deceased, who died on September 25, 1948, as a result of the injuries hereinafter described.

2. Before and at the time of the injuries sustained by plaintiff's decedent resulting in his death, which is the subject of this complaint, defendant was a common carrier by railroad, owning and operating, in interstate commerce, a main line railroad from Fortress Monroe, Virginia, to Cincinnati, Ohio, said railroad being operated through the Richmond Division of the United States District Court for the Eastern District of Virginia, maintaining a divison point with offices, railroad yards, repair shops, etc., at Richmond, Virginia, within said division of said district; and the injuries complained of occurred while it was engaging in such commerce and while plaintiff's decedent was being employed by defendant in such commerce, his duties being in furtherance of interstate and foreign commerce and directly, closely and substantially affecting such commerce. This action is brought by the plaintiff for the benefit of the surviving widow and minor children, the dependants of the decedent, under and pursuant to the provisions of the Federal Employers Liability Act, United States Code Annotated Title 45, Chapter 2, Sections 51 to 60.

[fol. 3] The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

3. On or about September 25, 1949, the defendant was engaged in coupling, uncoupling and shifting cars from one track to another in its Fulton Yard, in the City of Richmond, Virginia, in order to make up cars and trains for other destination points. While defendant was thus engaged, plaintiff's decedent was performing his duties as an employee (brakeman) of the defendant, and was riding on the rear of the tender of engine No. 114, which was making a reverse movement in a westwardly direction out of ladder track No. 12, pulling approximately 17 boxcars. Defendant, through its agents, servants and employees, then and there performed the operation in which it was engaged in a careless, reckless, unlawful and negligent manner in that while it knew, or in the exercise of ordinary care should have known full well, the position of the decedent and the work in which he was engaged, it failed to keep a proper lookout for him, to give him proper signals or warnings of its intention to stop the said engine suddenly, or to warn decedent of a hitherto unprecedented and unexpected change in the manner of shifting cars, i. e., that a sudden stop was to be made at the lead track, although it knew full well that such a change would place decedent in a position of extreme danger, if he were not so warned, and failed to operate said locomotive and cars in a careful and prudent manner under the circumstances then and there existing, and to furnish decedent a reasonably safe place in which to work, and in other respects and particulars, by reason of and as a result of which violations of law and negligence on the part of the defendant and its agents, servants and employees, defendant's said locomotive was caused to suddenly apply its emergency brakes, thereby causing decedent to be thrown from a position of safety on the rear of the tender of said locomotive upon the tracks in the path of the backing locomotive and was struck, dragged, run over, crushed and [fols. 4-5] mangled, causing him severe and grievous injuries from which he did in a few minutes thereafter die.

4. Prior to his death, decedent was a strong, able-bodied man capable of earning and actually earning Three Hun-

dred ($300.00) to Three Hundred Fifty Dollars ($350.00) a month. At the time of his death, he was thirty-one (31) years of age. Decedent's dependents, who are his widow and four minor children, have suffered great pecuniary loss and damage as a result of his fatal injuries and death.

5. Wherefore, plaintiff demands judgment against the defendant in the sum of One Hundred Thousand Dollars ($100,000.00) and costs.

Trial by jury is demanded.

Geo. E. Allen, 611 Mutual Building, Richmond, Virginia,

Geo. E. Allen, Jr., 611 Mutual Building, Richmond, Virginia, Attorneys for Plaintiff.

July 18, 1949.

(Verdicts of jury omitted in printing.)

[fol. 6] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title Omitted]

MOTION TO STRIKE OR TO MAKE MORE DEFINITE—Filed July 28, 1949

Now comes the defendant, The Chesapeake and Ohio Railway Company, and avers that in line 24 of paragraph 3 of the plaintiff's Complaint, it is alleged that the defendant was negligent "in other respects and particulars", without specifying in what respect and particulars, and that said allegation is so vague and ambiguous that a satisfactory reply cannot be framed thereto, and hence the defendant moves that said allegation be stricken out of the Complaint or that a more definite statement be supplied before the defendant be required to answer said allegation.

This application is based upon the provisions of Rules 8(a) and 12(e) of the Federal Rules of Civil Procedure.

The Chesapeake and Ohio Railway Company, By Meade T. Spicer, Jr., Att'y for defendant, Address; 1103 Mutual Bldg., Richmond 19, Va.

July 28, 1949.

To: George E. Allen, Attorney for plaintiff.

Take Notice: That the above motion will be presented to the Court for hearing, on Monday, the 8th day of August, 1949, at 11:00 o'clock A. M.

Meade T. Spicer, Jr.

[fol. 7] A true copy of the above Motion with notice of time of presentation for hearing was served by mailing a copy of the same to Mr. George E. Allen, attorney for the plaintiff at his office on July 28, 1949.

Meade T. Spicer, Jr.

[fol. 8] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title Omitted]

ANSWER—Filed August 8, 1949

1. Defendant admits the allegations of paragraph 1 of the Complaint, except that it is without knowledge or information sufficient to form a belief as to whether the plaintiff's decedent died as a result of the injuries alleged to have been received, or from other causes.

2. Defendant admits the allegations of paragraph 2.

3. Defendant admits the allegations of the first two sentences of paragraph 3 as to the nature of the work in which the plaintiff's decedent was engaged, except that more than 17 cars were being pulled by the locomotive.

4. Defendant denies the allegations of paragraph 3 that the operation being performed by it was performed by its agents, servants and employees in a careless, reckless, unlawful or negligent manner, with respect to the position

of the decedent and its knowledge thereof, and the work in which he was engaged; defendant denies that it failed to keep a proper lookout for decedent or failed to give him proper signals or warnings; defendant denies that the locomotive was stopped suddenly while the decedent was [fol. 9] on its tender, or that any unprecedented and unexpected change was made by it in the manner of shifting the cars.

5. Defendant denies the allegations of paragraph 3 that a sudden stop was made at the lead track while the decedent was on the tender of said locomotive, or that he was placed in any position of extreme danger by any act, omission or negligence on the part of its agents, servants and employees; defendant denies that it failed to furnish the decedent a reasonably safe place to work, in view of the nature of its business and the work required to be carried on; defendant denies that it failed to operate its locomotive and cars in a careful and prudent manner under the circumstances existing, and defendant denies that it was negligent or violated the law in other respects and particulars.

6. Defendant denies that the decedent was caused to be thrown from a position of safety on the locomotive tender, upon its tracks or in the path of said locomotive, by any sudden application of its emergency brakes, or that any act, omission or negligence on the part of the defendant was the cause of decedent falling from the tender, being struck, dragged, run over, or injured, or that there was any negligence as to the place or in the manner in which the locomotive was stopped by the defendant's employees.

7. Defendant admits the allegations of paragraph 4, except that defendant avers that his age was 32 years and that his earnings averaged $300.00 per month.

8. Defendant denies that the plaintiff is entitled to recover any sum for the injuries alleged or the consequences of such injuries.

[fol. 10] For Separate and Complete Affirmative Defenses to the Allegations of the Complaint, Defendant Alleges:

9. Defendant avers that the injuries received by the decedent in falling from the locomotive tender were solely and proximatly due to his own negligence and to his own unforeseeable and independent acts.

10. Defendant avers that the decedent was an experienced brakeman, was in a safe position and had full knowledge of the engine movements being made and to be made, before and at the time of his falling from the locomotive.

11. Defendant avers that the decedent had full knowledge of the physical situation and the method of doing the work, and was in position to have signalled the engineer, if necessary to do so, for his own safety or convenience.

12. The decedent's injuries were solely due to an accident which could not have been reasonably foreseen or anticipated by the defendant or its servants, agents and employees.

Wherefore, the defendant demands a directed verdict and judgment in its favor with costs.

Meade T. Spicer, Jr., Walter Leake, Attorneys for Defendant, Address of both: 1103 Mutual Bldg., Richmond 19, Va.

Certificate of Service

Legal service of the above Answer was made on the 8th day of August, 1949, by mailing a copy of the same to Mr. George E. Allen, attorney for the plaintiff, at his office address.

Meade T. Spicer, Jr.

[fol.11] [File endorsement omitted]

In United States District Court

[Title Omitted]

Notice to Take Depositions—Filed August 16, 1949

Please take notice that at ten o'clock A. M., on the 25th day of August, 1949, at the offices of Allen & Allen, Attorneys at Law, 611 Mutual Building, Richmond, Virginia, the plaintiff in the above entitled action will take the deposition of Edward Wiles, engineer on the locomotive which ran over plaintiff's decedent, upon oral examination, pursuant to the federal rules of civil procedure, before A.

Colton Williams, a Notary Public, or before some other officer authorized by law to administer oaths. The oral examination will continue from day to day until completed.

You are requested to have the above employee present. You are invited to attend and examine.

— Geo. E. Allen, 611 Mutual Building, Richmond, Virginia,

Geo. E. Allen, Jr., 611 Mutual Building, Richmond, Virginia, Attorneys for Plaintiff.

August 8, 1949.

I hereby certify that the above notice was served on Walter Leake and Meade T. Spicer, Jr., attorneys for the defendant, on the ___ day of August, 1949, by mailing a copy thereof to their last known office addresses, pursuant to Rule 5(b) of the Federal Rules of Civil Procedure.

Geo. E. Allen, Jr., Attorney for Plaintiff.

[fol. 12] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title Omitted]

ORDER REQUIRING MORE DEFINITE STATEMENT, ETC.—Filed October 31, 1949

This day came the parties by their respective attorneys and the defendant's motion that the charge of negligence in the words "in other respects and particulars" contained in line 24 of paragraph 3 of the Complaint be stricken out of the Complaint or a more definite statement be supplied, having been argued and considered;

It Is Ordered that on or before December 1, 1949, a more definite statement, by way of amendment, shall be supplied by the plaintiff, or the words "in other respects and particulars" shall be taken and considered as stricken from the plaintiff's Complaint.

Sterling Hutcheson, United States District Judge.

Date: Oct. 31, 1949.

[fol. 13] We ask for this: Meade T. Spicer, Jr., for the C. & O. Ry. Co.

Seen: Geo. E. Allen, Jr., of Counsel for Plt.

[fol. 14]

ALLEN, ALLEN & ALLEN
Attorneys at Law
Mutual Building
Richmond 19, Virginia

January 24, 1950

Mr. Walkley E. Johnson, Clerk
United States District Court
Post Office Building
Richmond, Virginia

Re: Viola Hall Moore, Admr., v. C & O Railway Co., Civil Action No. 1023.

Dear Mr. Johnson:

I will thank you to issue subpoenas commanding the following witnesses to appear and testify on behalf of the plaintiff in the above-styled case:

1. Oscar P. Enroughty Ph. 4-7254, 2112 Kenwood Ave. (Lakeside), (Yard master C & O Ry. Co., Fulton Yard).

2. W. R. Gibson Ph. 3-3976, 3703 Vawter St. (brakeman C & O Ry. Co., Fulton Yard).

3. A. L. Holland Ph. 82-0621, 3916 Broad Rock Road (Conductor C & O Ry. Co., Fulton Yard).

I am enclosing attendance checks payable to the above witnesses in the sum of $4.00 each, which I will thank you to turn over to the marshal, along with the subpoenas.

Very cordially yours,

Geo. E. Allen, Jr.

GEAJr:G Enc. 3 Jan 30, 1950, 10:00 o'clock.
Issued and filed Jan. 25, 1950, Walkley E. Johnson, Clerk, Marie B. Grubbs, Deputy Clerk.

[fol. 15] Civil Subpoena

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action File No. 1023

VIOLA HALL MOORE, Admr. *vs.* CHESAPEAKE AND OHIO RAILWAY CO.

To Oscar P. Enroughty, 2112 Kenwood Ave. (Lakeside) Yard Master, C&O RR Fulton Yard, W. R. Gibson, 3703 Vawter St., Richmond, Va. (Brakeman C&O RR Fulton Yard), A. L. Holland, 3916 Broad Rock Road, Richmond, Va. (Conductor C&O RR, Fulton Yard).

You Are Hereby Commanded to appear in the United States District Court for the Eastern District of Virginia at the P. O. Bldg. 10th & Main Sts. in the city of Richmond, Va. on the 30th day of January, 1950 at 10:00 o'clock A. M. to testify on behalf of the Plaintiff in the above entitled action.

Date: January 25, 1950.

Walkley E. Johnson, Clerk. By Marie B. Grubbs, Deputy Clerk.

George E. Allen, Jr.

Return on Service

Received this subpoena at Richmond, Va., on Jan. 25, 1950 and on Jan. 25, 1950 at the above addresses I served it on the within named Oscar P. Enroughty, W. R. Gibson and A. L. Holland by delivering a copy to them and tendering to them the fee for one day's attendance and the mileage allowed by law. ($4.00). Subpoena for A. L. Holland was delivered to Mrs. Holland, his wife.

R. L. Ailworth, U. S. Marshal, by Harold D. Hamner, Deputy.

Dated Jan. 25, 1950.

Service Fees

Travel	$1.32
Services	1.50
Total	$2.82

Marshal's return filed executed Jan. 26, 1950. Walkley E. Johnson, Clerk, by M. Louise Slaughter, Deputy Clerk.
Subscribed and sworn to before me, a this day of , 19 .

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

[fol. 16] [File endorsement omitted.]

[fols. 17-18] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 1023

VIOLA HALL MOORE, Administrator of The Estate of Louis Lee Moore, Jr., Deceased,

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

Reporter's Transcript of Testimony and Proceedings—
Filed March 14, 1950

Before Honorable Sterling Hutcheson, United States District Judge, and a Jury, Richmond, Virginia, January 30, 1950.

APPEARANCES:

George E. Allen, Esq., George E. Allen, Jr., Esq., Counsel for the plaintiff.

Walter Leake, Esq., Meade T. Spicer, Jr., Esq., Counsel for the defendant.

[fol. 19] A Jury was selected and sworn and opening statements were made on behalf of the plaintiff and the defendant.

DR. J. C. LEFOX, called as a witness by the plaintiff and being first duly sworn, testified as follows:

Direct Examination

By Mr. Allen:

Q. What is your profession?
A. Practicing medicine.
Q. How long have you been practicing medicine?
A. Eighteen years.
Q. Were you the coroner who saw the deceased, Mr. Moore, in this case?
A. Yes.
Q. Where was he when you first saw him?
A. He was at the undertaker's establishment.
Q. At the funeral home?
A. Yes.
Q. Did you make out the death certificate in this case?
A. Yes, sir.
Q. I will show it to you to refresh your memory.
A. I have a copy.
Q. Did you examine the body?
[fol. 20] A. Yes, sir.
Q. What did you find with reference to injuries?
A. The main injury, of course, was a fracture of the spinal cord and it was assumed he had a transection of the spinal cord itself, a fracture of the vertebrae of the neck and transection of the spinal cord itself. He had amputation of the lower left arm and he had numerous rib fractures and, from examination at the time, it was also assumed he also had punctured lungs. He had numerous other small injuries.
Q. What about generalized contusion?
A. General bruising.
Q. All over his body?
A. All over his body.
Q. Did you perform any autopsy?
A. No, sir.

Q. You noted no evidence of any disease of any kind?
A. No, sir.
Q. The examination was purely to establish the cause of death.
Q. And you established what as the cause of death?
A. Probable anatomical cause of death was transection of the cervical spinal cord, fractured ribs, punctured lung and amputation of the left arm.
Q. And under the provision "Manner of death", what [fol. 21] did you find?
A. Classified as an accident.
Q. Were you at that time employed in any way by the railway company?
A. No, sir.

Mr. Allen: That is all.
Mr. Spicer: No questions.

Viola Hall Moore, the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Allen:

Q. Mrs. Moore, I believe you are the widow of Louis Lee Moore, Jr.?
A. Yes, sir.
Q. Would you mind telling us about when he lost his life?
A. September 25, 1948.
Q. For whom was he working at that time?
A. The C. & O. Railroad.
Q. In what capacity did he work for the railroad?
A. He was a brakeman at the time. He had been promoted to conductor but he was braking again.
Q. How long had he been working for the railroad [fol. 22] company?
A. It was six years and something—pretty close to seven years.
Q. How old was Mr. Moore at the time he lost his life?
A. Well, he was thirty-two years old August 27th.

Q. What was his general state of health so far as you could observe?

A. He had been in real good health for the past eleven months, I think. He was sick about thirteen months before that accident and they thought it was acute indigestion and later the C. & O. doctor said it was a heart attack he had but he was in the hospital about six weeks and he came home and he was home about two weeks and he went back to work and he had been in real good health ever since.

Q. Had he had any return of that trouble, whatever it was?

A. No, sir.

Q. And it was the C. & O. doctor that treated him?

A. Yes, sir.

Q. After he went to work from that illness on, did he work regularly?

A. Yes, sir.

Q. About what size man was your husband?

A. He was about five feet four and one-half.

[fol. 23] Q. How many children did he leave?

A. Four.

Q. What are their ages?

A. One ten, one eight, one five and one three.

The Court: Have her give the names of the children.

By Mr. Allen:

Q. Give the names of the children.

A. Caroline Virginia Moore, ten; Louis Lee Moore, Jr., was eight yesterday; Fay Dorinda Moore is five and the baby is three. She will be four next month.

Q. What is her name?

A. Maxime Marie Moore.

Q. Were you and your husband living together at the time of his death?

A. Yes, sir.

Q. Had there been any separation or thought of separation as far as you know?

A. No, sir.

Q. Was he living with you and the children?

A. Yes, sir.

Q. What sort of a family man was he?

A. He was a real good provider and good father and husband.

Q. What was his attitude toward you and the children? [fol. 24] A. He thought there wasn't anything like us. Anybody can tell you that.

Q. How much money was he earning?

A. He earned from one hundred thirty some dollars and some weeks he would earn around $160.00 every half.

Q. Making approximately $300.00 a month, you would say?

A. Yes.

Q. What did he do with that money?

A. He would cash his check and bring it home and give it all to me. I handled the money and if he wanted carfare he would ask me for it.

Q. What would he say when he would ask you?

A. He would say, "Honey"——

Q. Did he stay at home except when he was at work?

A. Yes, sir.

Q. Just contain yourself. From the time he was sick and was said by the C. & O. doctor——

Mr. Spicer: I suggest we might have an adjournment.

The Court: We will recess for a few minutes.

(A short recess was taken.)

By Mr. Allen:

Q. Mrs. Moore, when your husband left home that morning to go to work, what time did he leave?

[fol. 25] A. He left that evening about a quarter after two.

Q. Where had he been all that morning?

A. Well, he had been home all morning and he went over and got his check and brought it home and gave it to me and then he went to the grocery store and came home and ate his dinner, got his lunch and went to work.

Q. When he left, what sort of spirits was he in?

A. He was in real good spirits.

Q. Did anything appear to be wrong with him at all?

A. No, sir, he was real happy.

Q. I believe you stated that he was about as tall as you are?

A. Yes.

Q. What was his weight?

A. He weighed about 140 or 145. I think it was around 140.

Q. Have you a photograph of him taken standing by you any time shortly before the accident?

A. That picture right there was taken not quite a week before he was killed. He never did see that picture. He was talking about the picture before he went to work and he said, "Honey, I certainly would like to see that picture."

The Court: What is the purpose of that photograph? [fol. 26] Mr. Allen: It is very important to show the size and height of this man, and, in addition to that, it is part of the evidence of his family. She has testified he had these four children and the ages of them and it is corroborative of her testimony. The important thing, however, is to show his size and build, that he is actually just about her height because the picture is taken with her.

Mr. Spicer: We think he has been sufficiently described. We ask that it be stricken out.

The Court: I think he has been sufficiently described, Mr. Allen. There is no denial of the ages of any of the parties.

Mr. Allen: We wish to take an exception to that ruling upon the ground that the picture is the best evidence of the man's size, build and height, and that is one of the important things in the case.

The Court: I adhere to the ruling.

By Mr. Allen:

Q. Without showing any pictures at all, I want to ask you if he ever had his picture taken except with members of his family, so far as you know?

A. No, I don't have any of them by himself.

[fol. 27] Q. Did he have pictures taken with members of the family often?

A. Yes, sir.

Q. About how many times, according to your best recollection?

A. Well, I have an awful lot of pictures at home and all of them were made with members of the family.

Mr. Allen: If Your Honor please, it is admitted in the answer that she is duly qualified so I don't see any use in encumbering the record with the certificate of qualification.

Cross Examination

By Mr. Spicer:

Q. Did I understand you to say your husband did go to the hospital about a year before his death?
A. Yes, sir.
Q. And how long was he there?
A. About six weeks.

Mr. Allen: May it please Your Honor, some depositions on oral examination were taken. I think there were some of the pictures filed with those depositions. We would like to have them.

[fol. 28] Ray Selden, called as a witness by the plaintiff and being first duly sworn, testified as follows:

Direct Examination

By Mr. Allen:

Q. Mr. Selden, will you state your name, please?
A. Ray Selden.
Q. What is your occupation?
A. Professional photographer.
Q. Did you take at our request any photographs of the engine and tender involved in this case?
A. Yes, sir.

Mr. Spicer: I take it Mr. Selden doesn't mean to say what engine was involved in the case. He took a picture of an engine pointed out to him?
Mr. Allen: Engines 113 and 114.

By Mr. Allen:

Q. I hand you photographs marked Exhibits 1 and 2 which were filed with certain depositions which were taken in this case and will ask you if you, at our request, took those photographs?
A. Yes, sir.

Mr. Leake: What engine is that?

Mr. Allen: 113 and the other is the track.

Mr. Leake: Same engine?

Mr. Allen: One engine and one is the track.

[fol. 29] Engine 114 is here somewhere. Here is one we want to introduce. That is 114.

By Mr. Allen:

Q. I hand you now a photograph of Engine No. 114 with the tender with some cars hooked on it in front and will ask you if you took that photograph at our request?

A. Yes, sir, I made this photograph at your request.

Mr. Allen: We offer that in evidence. I suppose these will have to be offered again here. Those that came out of the depositions.

(The photographs were filed and marked Plaintiff's Exhibits Nos. 1, 2 and 3.)

Cross Examination

By Mr. Spicer:

Q. You didn't take any pictures with anybody on the footboard of the engine, did you?

A. No, sir, I did not.

Q. And you didn't know anything about the accident yourself?

A. No, sir.

Q. You went down and took pictures at the request of Mr. Allen?

A. Yes.

Mr. Allen: May it please Your Honor and Gentlemen, [fol. 30] we believe it will probably help if we introduce one more photograph showing the track a little bit clearer.

By Mr. Allen:

Q. I hand you a photograph showing the tracks and ask you if you can point out tracks 12 and 13 on the photograph?

A. I would hesitate to identify the tracks by number, because I made the photograph but I wouldn't know the numbers of the tracks involved.

Q. You took the photograph?
A. I took that photograph.
Q. Of the tracks?
A. Of the tracks.

Mr. Allen: We offer that in evidence as one of plaintiff's exhibits.

(Filed and marked Plaintiff's Exhibit No. 4.)

By Mr. Spicer:

Q. Would you mind stating which direction the camera was facing at that time? Call east toward Newport News and west toward Richmond.

A. The camera was facing east there, as you can see from the photograph, looking toward the coal tipple.

Mr. Allen: We wish to call Mr. Wilds, the engineer, [fol. 31] as an adverse witness. He was in charge of the engine, in full control of its operational activities.

The Court: Mr. Allen, does it necessarily follow that he would be an adverse witness? He may be called and if he proves adverse——

Mr. Allen: That was permitted in a case in 160 Fed., a case almost identical to this in every particular and in the case involving the elevator operator of Murphy's Hotel.

Mr. Spicer: We want to say he has already had full opportunity to talk to Mr. Wilds and he has his statements reduced to writing in the form of a deposition. There is no showing of adverseness.

The Court: I think he first should be shown to be adverse.

Mr. Allen: We think that the reading of the deposition itself would show that but we pass that by for the present.

S. E. Wilds, called as a witness by the plaintiff and being first duly sworn, testified as follows:

Direct Examination

By Mr. Allen:

Q. State your name.
[fol. 32] A. Samuel Emmet Wilds.

Q. What is your occupation?
A. Engineer.
Q. For whom?
A. Chesapeake & Ohio Railroad.
Q. How long have you been an engineer for the Chesapeake and Ohio Railway?
A. I was promoted in 1929.
Q. Were you operating the engine on the 25th of September, 1948, at the time that Mr. Louis Lee Moore, Jr., lost his life?
A. I was.
Q. What number engine was it?
A. 114.
Q. Where were you operating? On the Fulton Yards, I understand?
A. Yes, sir.
Q. In what direction was the engine moving?
A. Moving in a westward direction.
Q. However, the front of the engine was facing the opposite direction?
A. Facing the east.
Q. You were then backing up?
A. Yes, sir.
Q. Were any cars hooked to that engine and, if so, on [fol. 33] which end of the engine?
A. The cars were hooked to the front of the engine.
Q. So you were backing up, pulling the cars?
A. That is right.
Q. And you were moving in a westerly direction?
A. That is right.
Q. About how fast?
A. About five miles an hour.
Q. What time of day was it?
A. Somewhere around 3:50, I think.
Q. What was the weather?
A. As I recall, it was fair.
Q. Can you tell us about where the accident happened, just generally speaking, not the exact spot?
A. It happened on a ladder track in Fulton Yard.
Q. I hand you a photograph marked Exhibit No. 2, and will ask you if that is a fair representation of the track in the general neighborhood of where the accident happened?

A. Yes, sir.

Q. Can you point out which track is the ladder track?

A. This is it going here.

Q. In other words, you have the word "ladder" written in the middle of the ladder track?

A. I don't know whether I put that word there or not, if that is what you mean, but that is a ladder track there.

[fol. 34] Q. You remember when your deposition was taken, I believe you were asked to write the word "ladder"?

A. I may have.

Q. Anyway, that straight track is what you call the ladder track?

A. Yes.

Q. The straight track on down that way. Which way were you headed in the picture—toward us or the other way?

A. You mean which way was the engine headed?

Q. In which direction were you moving?

A. Which way was I moving?

Q. Yes.

A. Back this way.

Q. You were moving back this way. Then you were coming out of which one of these tracks over there?

A. No. 12.

Q. Is that the first one or second one?

A. Second one.

Q. You were coming out of No. 12 and coming in on the ladder track. About how far were you from the switch when you stopped, when your train came to a dead stop after the accident?

A. When the train came to a dead stop?

Q. Yes. How far was your engine from the switch?

A. An engine length or car length.

[fol. 35] Q. No, I mean about what was the distance in yards or feet of your engine from the ladder track when you came to a stop after the accident?

A. Well, I don't understand that question because the engine was on the ladder track when it came to a stop.

Q. I mean the ladder track. You were on the side track No. 12, weren't you, coming out of No. 12?

A. That is right.

Q. You were coming into the ladder track, as I understand it?

A. That is right.

Q. I want to know how far your engine was from the ladder track when it came to a dead stop after the accident?

Mr. Spicer: Your Honor, he has stated it was in the ladder track.

A. I don't understand that.

By Mr. Allen:

Q. You were in the ladder track?
A. Sure, I was on the ladder track.
Q. You had gotten out of the switch then?
A. Yes, sir.
Q. How fast were you traveling?
A. Around five miles an hour.
Q. In what capacity was Mr. Moore working at that time?
[fol. 36] A. As a brakeman.
Q. In that capacity where was he supposed to stand at that time?
A. Supposed to ride on the footboard of the engine.
Q. I show you Exhibit No. 1 which I believe also was filed with your deposition when it was taken, showing Engine No. 113. Is the footboard and all like Engine No. 114?
A. Whether that is the exact size of the 114 footboard and all like that, I don't know, but it is the same class engine.
Q. The footboard on which you said he was standing—is that the one to which I am pointing my pencil?
A. That would be the one.

Mr. Spicer: You mean the corresponding one?

By Mr. Allen:

Q. The corresponding one?
A. Yes.
Q. On No. 114. Look at Plaintiff's Exhibit No. 3 and I think you will see "114" right there.
A. No doubt that is "114" but I can't make out anything there but a "1" and a "4".
Q. Look again and see if you don't see two ones and a four?

A. I can't see it.

Q. I ask you to point out to the Jury the footboard on [fol. 37] this engine where Mr. Moore was standing.

A. You can't see the footboard very plain on that engine.

Q. It isn't so plain, I agree with you, but that is it right there, isn't it?

A. Yes. There is a footboard, I believe, right there.

Q. Point that out to the Jury, if you please.

A. Gentlemen, you can't see that picture very plain but there it is right there.

Q. Where were you in the engine at the time the accident happened, at the time that Mr. Moore fell?

A. I was sitting on the engineer's seat box in the cab.

Q. Point with a pencil about where you were.

A. I can't see the seat box.

Q. Well, you can point out where it was?

A. I could show you about where the window was. There is the window.

Q. The window on the side. Is that the window?

A. That is it.

Q. And you were sitting there on the engineer's seat inside of the cab, as I understand it?

A. Yes.

Q. Do you look in the direction in which you are moving when you are moving along?

[fol. 38] A. Yes, sir.

Q. Then you were looking west, I believe?

A. That is right.

Q. Do you look where you are going along the track when you are moving?

A. Yes, sir, you look and see the condition of things.

Q. Generally does your vision go along the track where you are going in the direction in which you are moving?

A. That is right.

Q. Was Mr. Moore giving you any signal at the time of the accident?

A. No, sir.

Q. How long had it been since he had given you any signal?

A. He gave me the back up signal to start out with on the footboard.

Q. Where was Mr. Moore found immediately after you stopped the engine and cars?

A. Laying outside the rail about ten or twenty feet from this No. 12 switch stand.

Q. What condition was his body in? Was any part of his body severed—arms or anything?

A. Well, I didn't examine the body and I didn't go close to the body after the accident.

Q. With reference to the position as to the engine and [fol. 39] tender and cars, how much of the train had passed over him or passed by him, however you want to term it?

A. An engine length, a car length and a small part of the second car in front of the engine.

Q. You refer to the engine as embracing both the tender and the engine?

A. That is right.

Q. So the tender and the engine and the first car in the front of the engine and about half of the next one?

A. Not quite half of the next one.

Q. Did you notice whether either hand had been cut off?

A. I noticed his left hand had been cut off. May I correct that? A hand had been cut off. Whether his left or right, I couldn't say positively.

Q. Do you know about how long the engine and tender and the car is that had passed over him or by him?

A. Well, boxcars run different lengths. I think it is around 36 to 46 feet.

Q. Within what distance did you stop after making the application of the brakes?

A. An engine length, a car length and around half of another car.

Q. Do you know at what rate of speed you were traveling?

[fol. 40] A. My judgment——

Mr. Spicer: He has answered that question, two or three times.

The Court: I think he has said five miles on hour.

Mr. Leake: Twice.

By Mr. Allen:

Q. Do you know whether that was as quickly as you could stop under the circumstances?

A. Yes, sir.

Q. Do you happen to know within what distance ordinar-

ily you can stop, traveling at five miles an hour by emergency application of your brakes?

A. That all depends on the condition of the equipment, the condition of the rail, and what you have to stop.

Q. Do you know what sort of application of your brakes you made in this instance, whether you put your brakes in emergency?

A. They were put in emergency.

Q. Was it a sudden stop or not?

A. Emergency stop. That is a quick stop.

Q. About as quick as you could stop ordinarily?

A. Yes.

Q. Did you reverse the engine?

A. Pulled the bar ahead, yes, sir—reverse bar.

[fol. 41] Q. Did you give any notice or warning to anybody that you were going to stop?

A. No, sir.

Q. How does a brakeman in the position that Mr. Moore was in, give you signals—by hand, bell or whistle?

A. By hand.

Q. Standing on that footboard as you say that he was, what would he have to do to give you a signal so you could see it?

A. He stands so he could see the signals.

Q. I mean so you could see it. How would he give the signal with his hand?

A. He gives a call back signal with his hand.

Q. Do you know whether or not he had to reach out from behind the tender in order to give the signal for you to see it? Would he have to reach outside?

A. Standing on the edge of the footboard and they give a signal, and you can see it. They can get on the footboard next to the drawhead and you cannot see anything.

Q. What I am asking you, does he have to reach his hand out from behind the tender for you to see the signal?

A. He has got to get out in view where you can see his hand, if that is what you are trying to get at.

Q. Do you recall being asked this question when your deposition was taken on September 2, 1949, at our office:

[fol. 42] "Q. Does he give you the hand signal while he is standing behind the tender without reaching outside or does he reach outside beyond the edge of the tender to give the signal?

"A. He has to reach out where you can see it."

A. That is correct.

Q. Is that true?

A. If he stood behind the tank where you couldn't see the signal, there would be no reason to give it to you.

Q. Is it true, as you said here, that he has to reach out where you can see it?

A. That is right.

Q. So if he gave the signal standing up straight behind the tender, without reaching out, you couldn't see it? You couldn't see the signal, could you?

A. Without leaning out, do you mean?

Q. Without reaching?

A. Without his hand going out like that, you can't see the signal.

Q. You, I believe, were on the right side of the engine and he was on the right side too, on the tender on that step on the right side?

A. Yes.

Q. Do you ever drive an automobile?

A. Yes, sir.

Q. If you are driving an automobile at most any reason-[fol. 43] able rate of speed and you have a guest sitting beside you to the right and you apply your brakes in emergency and stop without giving the guest any notice or the guest not knowing you are going to stop, do you know which way the guest would go, whether the guest would go forward toward the windshield or come back?

A. He would go forward.

Mr. Spicer: I don't see that that has got any relevancy to this case.

The Court: I rather think so myself.

Mr. Allen: I want to know if he has knowledge of the laws of physics, if Your Honor please.

The Court: I think the Jury is as well qualified as the witness to say that.

By Mr. Allen:

Q. When you first saw Mr. Moore back there was he standing up straight on that footboard?

A. Yes, sir.

Q. Did you see him do anything or make any motion

or make any movement while he was still standing up straight?

A. Yes, sir.

Q. What did he do?

A. He was standing up like that and he started to slump.

Q. Straight down?

[fol. 44] A. As if his knees gave away like that, and straightened up.

Q. When he slumped he was standing straight and then when he straightened up he was still straight behind the tender?

A. Yes.

Q. On that step?

A. Yes.

Q. You were at that time moving?

A. I was.

Q. West, as you said?

A. Yes.

Q. Then what did you do?

A. I didn't do anything at that time.

Q. You didn't do anything at that time?

A. That is right.

Q. What happened after that?

A. You want me to tell about his falling off?

Q. Yes.

A. The next thing I noticed, his body was hitting the ground and he come off the footboard in somersault position. He hit on the back part of his shoulder on the ground. His feet were laying in a westwardly position and kind of an angle to the track.

Q. When he was in the somersault position was he [fol. 45] behind the tender or outside?

A. He had come a little bit to the outside, in other words, tumbling off.

Q. How much of him was outside when you saw him in the somersault?

A. I can't tell you how much of him. I saw his body when he hit the ground.

Q. Was he clear of the engine when he turned the somersault, clear of the engine and tender?

A. No, he wasn't clear.

Q. Before he completed the somersault was he clear of it?

A. I don't understand the question. Do you mean after he hit the ground was he clear of the engine, or what do you mean?

Q. Let us illustrate it this way: Let us see, if you don't mind standing right here in front of Mr. Tilghman, and let us say this table is the outside of the engine and tender and the step is a little short of the engine and tender, the end of it. Do you know how many inches?

A. No, I do not know exactly, but it is between four and six.

Q. It lacks then from four to six inches, according to your recollection, of being out even with the outside of the engine and tender. Now then, you stand where you saw [fol. 46] him when he slumped straight down and raised straight up and then turned a somersault and went on outside.

A. With my back to him?

Q. Whichever way the man was to you—Mr. Moore was to you.

A. Standing in this position. He slumped like that as if his knees had given away. He righted himself and all in a second's time he come tumbling head foremost like this off of the engine and I seen his body when he hit the ground on the back of his shoulder.

Q. When his body hit the ground how far was he from the engine and tender?

A. I don't exactly understand what you mean. The tender was moving back all the time and he fell right on the ground right at the step of the tender.

Q. How far was he then from the railroad tracks? We will put it that way.

A. Well, I can't answer that. He was laying right up beside the rail.

Q. Was he outside of the rail?

A. He was on the outside of the rail, yes.

Q. On it?

A. Not on the rail, no.

Q. On the outside of the rail?

A. Yes.

[fol. 47] Q. On the ends of the ties?

A. Well, that track is covered up. The ties are not exposed. It is very near level there.

Q. How far was he from the rail, if you can tell us, when he hit the ground?

A. I imagine his shoulder and all hit about six or eight inches from the rail.

Q. Did any part of the tender run over him, so far as you know?

A. I don't know what run over him.

Q. Didn't you state in that deposition that not any part of it ran over him?

A. No, sir, not as I recall.

Q. Why did you ask this question that day:

"Q. He was between the wheels, wasn't he?

"A. No, he was lying on the ground on the outside of the rail and about half of the car had gone by him.

"Q. Had it run over him?

"A. No.

"Q. What part of the car or train ran over him?

"A. I couldn't tell you that. I can't answer that question."

So now is it true that any part of it had run over him or is it true that you don't know whether any part of it [fol. 48] ran over him or not?

A. I can't positively state what part ran over him.

Q. I want to know if anything ran over him?

A. Something ran over him in order to cut his wrist off.

Q. Do you recall whether you applied the brakes, according to your recollection, before or after the man hit the ground?

A. I applied the brakes just as he was hitting the ground.

Q. Didn't you say in the deposition which you gave, page 21, "When I saw him starting to fall, then is when I applied the brakes in emergency?"

A. When I see him hit the ground——

Mr. Spicer: "When I saw him fall."

Mr. Allen: He says here, "When I saw him starting to fall, then is when I applied the brakes in emergency."

Mr. Spicer: He said up above, "At the time I saw him falling I applied the brakes in emergency".

Mr. Allen: Two places near the middle of the page.

By Mr. Allen:

Q. You didn't stop until the tender had passed him, the engine had passed him and one car had passed him and [fol. 49] not quite half of another car?

A. Yes.

Q. I believe you said Mr. Moore was acting in the line of his duty when he got hurt?

A. Yes.

Mr. Spicer: I think that is a legal question.

Mr. Allen: It is unimportant. You admit it in your answer.

The Court: He has testified that he was located on the tender at the place he should have been at the time.

By Mr. Allen:

Q. Mr. Wilds, was there a switch tender where this switch comes out into the ladder track there that day?

A. I don't recall.

Q. What are the duties of a switch tender?

A. Those on Fulton Yard are required to throw switches to let trains in and out of the yard and they sometimes assist in yard switching.

Q. Then you would say a switch tender is a man that looks after the throwing of switches. Would you say that?

A. Not necessarily all switches.

Q. I don't mean that. Who was your switch tender that day?

A. I don't recall.

[fol. 50] Q. Do you know where he was?

A. No, sir.

Q. Do you know Cliff Stephens?

A. Yes, sir.

Q. Was he a brakeman?

A. As well as I can recall, he is a promoted man. He brakes and runs conductor and the like of that.

Q. Was he on duty there that day?

A. I don't recall seeing him.

Q. Does he sometimes act as switch tender on the yard under circumstances like those existing in this case?

A. Sometimes he does.

Q. Was anybody around that switch, looking after that switch, immediately before the accident—the one that you were coming out of?

A. I don't recall anyone.

Q. Did you at any time, immediately before seeing Mr. Moore, as you stated you saw him, look around ahead of you and see who was around the switch or whether anybody was at the switch, or not?

A. I was looking out the window and looking west to see if the switch were properly lined and there was anything on the lead-track as a usual thing, you know.

Q. Were you going to take all of those thirty-eight cars out at one time through that switch?

[fol. 51] A. I don't know about that. I work by signals. I don't know whether they intended to put them all out and switch them or to stop and cut part of them off.

Mr. Allen: That is all.

Cross Examination

By Mr. Spicer:

Q. Mr. Wilds, the last question Mr. Allen asked you you were coming out of this No. 12 track with thirty-three cars behind the engine?

A. Yes.

Q. Pulling them?

A. Yes.

Q. Had you received any signal at that time to stop or to do anything—cut off any of the cars?

A. No, sir, I had not.

Q. What were you going to do in the event you didn't receive any further signals either from the conductor or from Mr. Moore or from anybody else?

A. Keep pulling the cars on back until I received a signal.

Q. And until you cleared the switch, until you cleared No. 12 switch?

A. Yes, sir.

Q. You keep——

[fol. 52] A. Probably beyond.

Q. You keep on going?

A. Yes.

Q. Mr. Wilds, who was Mr. Stephens referred to—a member of the crew that day?

A. I don't recall him being on that.

Q. Did you have a conductor in charge of your work?

A. Yes, sir.

Q. Who was he? Have you seen him here?

A. I can't think of it—Luther Holland.

Q. Mr. Wilds, what were you all doing at that particular time that this move of coming out of No. 12 switch took place?

A. We were coming back preparing to switch those cars.

Q. Was that what is known as a transfer job—the work you all were doing?

A. That is known as a transfer job that we were on but we were switching on the lead job.

Q. You were taking cars that had been brought in by a train and left in that track? Is that right?

A. That is right, sir.

Q. And you had coupled up to thirty-three of them. Were they loaded cars?

A. Yes, sir, they say they were loaded cars.

Q. What kind of cars—passenger cars?

[fol. 53] A. Most of them box cars.

Q. That was a freight train, wasn't it?

A. Yes.

Q. How far had you gone into No. 12 track with the engine before you coupled up to these cars?

A. I would say around ten or twelve car lengths.

Q. Was Mr. Moore on the engine at that time?

A. I don't recall where Mr. Moore rode up in that track—whereabouts on the engine he was at that time, going up in the track.

Q. Was he on the tender at the time the engine started going west, pulling thirty-three cars?

A. Yes, sir, he gave the signal to back up.

Q. He gave you the back-up signal?

A. Yes, and he was standing on the rear footboard.

Q. In the same place that he was at the time of the accident?

A. Same place.

Q. Same footboard?

A. Yes, sir.

Q. Mr. Wilds, what was Mr. Moore's job on the footboard there? What was he supposed to do?

A. His duties was to ride the rear of that footboard to the switch or beyond the switch and where ever he thought he was going to get off at, get off and cut the cars as [fol. 54] they switch them.

Q. Was there any reason for him to have gotten off of the footboard before the engine and tender reached the switch?

A. No, sir.

Q. Did you get any signal from him at all after he had given you the original back-up signal?

A. No, sir, none whatsoever.

Q. If any train had been coming or any engine had been coming on the same track down opposite the way you were coming, was it Mr. Moore's duty to give you a signal or protect the movement?

A. Oh, yes, sir, it was his duty.

Q. And he had not give you any such signal?

A. No, sir.

Q. Had anything happened at all to cause you to make any stop until Mr. Moore was seen to fall from the engine?

A. No, sir.

Q. Did you have any reason to make any stop until after you saw Mr. Moore fall?

A. No, sir.

Q. What would be the effect of the thirty-three cars that you were pulling on your stopping? Would that make it harder to stop or make it take a longer period of time and space to stop or shorter period?

[fol. 55] A. It would take a longer time to stop. You have so much weight behind you to stop.

Q. Was there any air pressure on those cars behind you?

A. No, sir, no air on the cars.

Q. Is it customary to have air taken off of cars before you start to switch them around the yard?

A. Yes. They bleed the air off the cars.

Q. It is much easier to move them around in switching?

A. Yes.

Q. Mr. Wilds, the move you were making—was there anything unusual about the coming out of No. 12 track into the ladder track?

A. No, sir, nothing that I know of.

Q. Was that in accordance with regular custom of doing the work?

A. Regular routine of duty, yes, sir.

Q. Was it anything unusual for Mr. Moore to be riding on the footboard of the engine?

A. No, sir.

Q. Is that a customary part of a brakeman's duty?

A. That is his duty, yes.

Q. Mr. Wilds, was there any rough handling of the cars or any jolt to the train immediately prior to the time that Mr. Moore slumped down or fell off?

[fol. 56] A. None that I noticed.

Q. You had been coming with the thirty-three cars steadily since the time you started?

A. That is right.

Q. And that was some ten car lengths away?

A. That is right.

Q. Were you able, in approaching No. 12 switch, to see whether the switch was properly fixed for you to come into the ladder or lead track?

A. Yes, sir, I could see that the switch was properly lined for my movement.

Q. Was Mr. Moore in position also to see that from where he was standing?

A. Yes, sir.

Q. He was facing in that direction?

A. That is right, yes, sir.

Q. If he had given you a signal, he would have given you a signal facing forward and having his back to you? Is that right?

A. That is right, yes, sir.

Q. And his back was to you continuously until the time that he fell?

A. That is right.

Q. When you saw Mr. Moore fall what did you do?

A. When I saw him fall?

[fol. 57] Q. Yes; did you continue to look at him or did you do something else?

A. No, sir. My attention was attracted to shut off the train. I shut off the throttle, throwed the brakes in emergency, cut on the sand and threw the reverse bar in.

Q. Did you do everything you could to stop?

A. I did everything I could to stop as quick as I could.

Q. Was there anything else you can see now, looking back, that you could have done?

A. Nothing that I know of.

Q. Were you expecting to stop before reaching that switch?

A. No, sir.

Q. Between the time that Mr. Moore slumped, you say, and straightened himself up right away, would there have been any time to have done anything in that period before he fell?

A. No, sir, it all happened within a couple of seconds.

Q. Mr. Wilds, you were at that time in the cab? You were in the engine cab?

A. Yes, sir, sitting on the engineer's seatbox in the cab.

Q. Which way were you facing?

A. I was facing the outside of the engine.

[fol. 58] Q. Which way were you sitting as to the cab?

A. Can I show you in this chair?

Q. Yes.

A. Say this is the arm rest of the cab. We have an arm rest. I was sitting in this position with my hand on the throttle, looking out to see the switch.

Q. Which side of the engine were you on at that time? Which is west?

A. You say which side of the engine?

Q. The engineer's side is on the righthand side?

A. Yes.

Q. That is when you are going forward? Is that right?

A. Well, you are on the right side of the engine going forward or going backward.

Q. You don't mean to say you change seats? It is still the same seatbox?

A. Yes.

Q. When you were going west you were actually on the left side of the engine?

A. Well, I don't know.

Q. The way the engine was going? You were on the south side?

A. That is right.

Q. Considering Richmond and Chicago are west, you were facing west, weren't you?

[fol. 59] A. Yes, I was looking back west.

Q. That put you on the south side of the engine?

A. That is right.

Q. Was your head altogether in the cab?

A. No, sir. I was leaning out the cab in order to look back to see my switches.

Q. To see the switch?

A. Yes.

Q. What about Mr. Moore?

A. And see any signals he might give.

Q. Was Mr. Moore continuously—or a part of Mr. Moore continuously in your view up to the time he fell?

A. The edge of his shoulder.

Q. From the edge of his shoulder?

A. Yes.

Q. And his arm?

A. Just the edge of his shoulder and arm.

Q. Did you have any difficulty in keeping him in view?

A. Sir?

Q. You didn't have any trouble keeping him in sight, did you?

A. No, sir.

Q. Mr. Wilds, I hand you herewith a picture to be marked Defendant's Exhibit A and ask you if you can identify that as the picture of Engine No. 114 taken from the side?

[fol. 60] A. Yes, sir.

Q. Is that a picture of you in the cab?

A. Yes, that is me in the cab.

Q. And I see a picture of a man on the footboard of the tender?

A. Yes, sir.

Q. Is that the footboard on which Mr. Moore was riding at the time the engine was coming out of No. 12 track?

A. Yes, sir.

Q. Was he continuously there until he fell?

A. Yes, sir.

Q. And you could see him until he did fall?

A. Yes, sir.

Q. Or part of him?

A. Yes, sir, part of his shoulder.

(Filed and marked Defendant's Exhibit A.)

Q. I hand you another picture marked Defendant's Exhibit B and will ask you if you can identify that as a

picture of Engine No. 114 taken facing the rear of the tender?

A. Yes, sir.

Q. Is the man on the footboard of that tender in that picture in about the position that Mr. Moore was at the time of the accident?

A. The same position about.

Q. Is that your head shown there in that picture leaning [fol. 61] out of the cab at that time?

A. Yes, sir.

Q. Mr. Wilds, what is that man in the picture holding onto?

A. The handrail.

Q. And that runs across the rear of the tank?

A. Yes.

Q. There isn't any footboard or step in the center of the car at the rear, is there? There isn't any footboard in the middle on this engine?

A. In between the footboards?

Q. Yes.

A. No.

Q. In other words, the coupling was in there but there is no footboard in the middle of that or underneath the coupling?

A. No, sir.

Q. Mr. Wilds, Mr. Allen asked you if you gave anybody any notice or warning that you were going to apply the emergency brake when you did apply it?

A. No, sir, I didn't give anyone.

Q. Why didn't you give anybody notice?

A. Well, it wasn't necessary in the first place, and, in the next place, I didn't have time to give anybody any notice.

[fol. 62] Q. Did you consider it much more important to put the brakes on as best you could rather than try to notify anybody?

A. Stop as quick as I could, yes, sir.

Q. Mr. Wilds, was it necessary for you to get any signal from anybody at that switch stand, No. 12 switch stand?

A. No, sir.

Q. You didn't have to get any o. k. from anybody to come out on the ladder or lead track, did you?

A. No, sir.

Q. You didn't have to get anything from a switch tender or anybody?

A. No, sir.

Q. Was Mr. Moore in position to give you any signal if that switch was not in place?

A. No, sir.

Q. How long had you all been working that day on duty before the accident happened? Had you made any moves with the engine?

A. No, that was our first move.

Q. Had you seen Mr. Moore or do you remember whether you saw him before he got on the engine?

A. When do you mean—before I started to work?

Q. Yes.

[fol. 63] A. I seen him come across to the engine.

Q. You don't remember now whether he rode the engine with you or not?

A. No, sir.

Q. Where did you get on the engine?

A. I got on the engine in what we call the ready track there by the little yard office.

Q. And you say that Mr. Moore fell, apparently striking his back, as well as you could see?

A. His back and his shoulder. He hit on his back and his shoulder.

Q. And you did not continue to look at him because you were directing your efforts to stopping the train?

A. Trying to stop, yes, sir.

Q. Do you happen to remember how long Mr. Moore had been working with that crew, that particular crew?

A. No, sir, I don't remember how many days he had been on that crew.

Q. You had seen him working as a brakeman at Fulton Yards a number of times?

A. I have worked with him a number of times, yes, sir.

Q. And you saw him, of course?

A. Yes.

Q. You certainly had no reason to do anything to hurt him in any way?

[fol. 64] A. Oh, no.

Q. And you had no idea in the world that he was going to fall off the engine at the time he did fall?

A. No, sir.

Q. So far as you noted that day, he was capable of carrying on this work?

A. So far as I know, yes, sir.

Q. Had any other member of your crew given you instructions or any signals to stop or slow up when you got to that No. 12 switch?

A. No, sir.

Q. And Mr. Moore fell off east of the switch itself?

A. Yes, sir.

Redirect Examination

By Mr. Allen:

Q. Mr. Wilds, with reference to the position in which you were seated and whether you were on the right side or left side of the engine, if you had been facing toward the front of the engine you would say you were on the right, weren't you? In other words, if you had been running in the opposite direction that you were, if you were going forward and not backward, you would have been on the right side of the engine?

A. I can explain that. The engineer's seatbox is on [fol. 68] what we term the right of the engine.

Q. And you say right with reference to going in the direction in which the front of the engine is pointing? That is right—like if you were sitting in an automobile and you are headed toward the front of the automobile, if you were headed east you would say you were on the south side, wouldn't you? Anyway, I will ask you this: Your brakes and throttle and what-not, are so made that you face the front of the engine in operating the engine? Isn't that right?

A. I don't get you exactly. We turn around on the seatbox and operate a whole lot of time and you are looking back this way out the side of the cab with your right hand working the throttle.

Q. Let us take this Bible here and let us say that is the front part of the engine—the cow-catcher is still up there. You still call them cow-catchers?

A. I don't know.

Q. Then if you were going in the direction in which the engine is pointing, the cow-catcher, you would be sitting over here facing toward the front, wouldn't you?

A. Yes, sir.

Q. But in this instance, you were backing so you had to turn, didn't you, and look out and look back.

A. This way. Here is the edge of the cab and I was [fol. 66] sitting with one arm on the armrest and hand up on the throttle and you can see anywhere you want to.

Q. So you were looking out and looking back?

A. That is right.

Q. How far is your throttle from the window that you were turned and looking back out of?

A. I don't know the exact dimensions but you can sit anywhere in that window and hold onto the throttle. In other words, the picture that was taken there of me sitting in the window, I have got my hand on the throttle, one of them, and the other one, as well as I remember—I had both hands on the armrest, taking a side view.

Q. You have reference to Defendant's Exhibit B there?

A. Yes.

Q. Is that you with your head out of the window in Defendant's Exhibit B?

A. That is me, yes.

Q. Did you have your hand on the throttle when you were looking out of the window like that?

A. Left hand on the throttle, yes, sir.

Q. Who was this man who was standing there on the footboard that day when this picture was taken?

A. His name is Nuttycomb.

Q. How tall is he?

A. I can't answer.

[fol. 67] Q. How much does he weigh?

A. I don't know that.

Q. In looking back on that day that this picture was taken, how much of that man would you see?

A. Well, you could see a little bit more of that man than you do of Mr. Moore. You could see very near that whole man's arm, shoulder and all. You can see from here right back to there.

Q. Looking at that picture, do you notice that that man is leaning somewhat outward with a part of his arm and shoulder beyond the edge of the engine?

A. According to the picture, he is.

Q. And that is the part of the man you could see?

A. I could see that man's whole arm.

Q. And you say you could see a little bit more of that man than you could of Mr. Moore?

A. That is right.

Q. As I understand, nothing was hooked to the rear of the tender?

A. No, sir.

Q. You said that Mr. Moore turned a somersault. Did he turn a somersault that way or straight or out this way?

A. He just doubled up like.

Q. In which direction was the somersault? In which direction was he turning—turning out?

[fol. 68] A. I didn't say that. He was turning backward.

Q. I want you to say. There is the tender and there is the man standing there and we will assume that the engine was moving slowly backward this way and when this man turned a somersault I want to know if he turned a somersault straight forward or turned a somersault to his right or turned any to his left?

A. He turned a somersault, just doubled up and rolled off of there a little bit on the outside.

Q. A little bit on the outside?

A. Yes.

Q. You said you saw him come to work that morning?

A. No, sir, that was in the afternoon.

Q. In the afternoon, I mean.

A. I seen him come out of the yard office that afternoon as I was going to the engine—the middle yard office.

Q. How close did you get to him before he was hurt?

A. I don't recall.

Q. Did you talk with him?

A. No, sir.

Q. Did you notice anything about him that was unusual?

A. No.

Q. So far as you could see and observe, could you say that he was all right?

[fol. 69] A. So far as I know.

Q. You, in answer to questions asked by Mr. Spicer, said that up to the time that you saw him fall you knew of nothing to cause him to fall, no unusual jolt or anything of that kind? Is that right?

A. Yes, sir.

Q. If a man were standing on the footboard, as Mr. Moore was, or anybody, for that matter; and had not

started to fall and you were to apply the brakes as you did, would that cause him to fall?

A. Not necessarily.

Q. I say would it, if he didn't have any notice of it?

A. I say not necessarily.

Recross Examination

By Mr. Spicer:

Q. Were you still in an operating position when you were looking, in a position to work the throttle at the time you were coming out of No. 12 and looking ahead and seeing Mr. Moore?

A. Yes, sir, I ride with my hand on the throttle.

Q. And you were in that position, as you say, when this picture, Exhibit B, this picture in which the man is standing on the rear of No. 114—you were in an operating position at that time?

[fol. 70] A. Yes, sir.

Carl Torrence, called as a witness by the plaintiff and being first duly sworn, testified as follows:

Direct Examination

By Mr. Allen:

Q. Will you state your name?

A. My name is Carl Torrence.

Q. What is your occupation?

A. Consulting engineer.

Q. How long have you been practicing your profession?

A. Since 1941.

Q. What has been the nature of your work and experience during that time?

A. From 1942 through 1945 I was connected with the R. F. & P. in the Engineering Department, during which time, among my other duties, I made surveys of all accidents, made measurements of the equipment that would be involved in accidents, and determined height, clearances, and height obstructions that would obstruct the view of railroad personnel and also anyone else involved in an accident.

Q. With what states are you registered?

A. Registered in Virginia, Maryland, Delaware, Kentucky, West Virginia. That is five.

[fol. 71] Q. Where are you located now in the practice of your profession?

A. 2022 Stuart Avenue.

Q. Did you at our request make any measurement or take any observations or make any maps of this engine No. 114 upon which Mr. Moore was riding when he was hurt?

A. I made detail measurements of Engine No. 114.

Q. Have you any of the sketches or blueprints of the sketches which you made?

A. Yes, sir, that is a copy.

Q. With reference to engine and tender No. 114, did you make any measurements or take any observations and make and measurements and then make a plat showing the size and distances and what observations the engineer had there of a person riding on the footboard of the tender?

A. I did.

Q. Will you take that diagram and show exactly what you did and what measurements you made?

A. To the lefthand side of the sheet is the rear elevation of the tender, also showing part of the cab above the top of the tender. You will see that the tender width is ten feet one inch over all. The width of the cab is ten feet three inches over all.

Q. The width of the tender is what?

A. Ten feet one inch.

[fol. 72] Q. And the cab?

A. Ten feet three inches.

Q. How high is the tender? The rear part of it?

A. The tender is nine feet 7½ inches high. You will see there that the step is one foot and one-half inch above the top of the rail and from the top of the step to the top of the tender is eight feet seven inches. Then, of course, part of the tender projects above that point; the part that you see on the side elevation there projects up. The measurement is not shown but I have it if you want it. That curved part is the part of the tender that projects above the main tender and it projects up.

Mr. Spicer: I didn't hear that.

A. I was explaining that the tender has a part above the top that carries the coal. It projects up three feet

eleven inches at the side and at the center line it is four feet 5½ inches high. It is a curved shape top.

By Mr. Spicer:

Q. Did you say tinder or tender?

A. Tender.

By Mr. Allen:

Q. How high is it from the step where you have that little curved mark to the top of the water tank?

A. It is eight feet seven inches.

Q. How far is the end of that footboard on which the [fol. 73] deceased is said to have been standing to the outside of the tender?

A. The edge of the step is ten inches from the edge of the tender. The step is three foot three inches wide. You will see that dimension shown on the plan view, that is a view looking downward from the top of the tender shown on the top righthand side of the page.

Q. Can you tell us what sight obstructions there are between the engineer's seat back to the step, the footboard at the end of the tender on which this decedent is said to have been standing?

A. If you consult the side elevation here, you will see that there are two windows from which the engineer could have looked backward. There is one window called a rear window and a side window. If the engineer chose to look out the back window, you will see I have two lines there called sight lines, from the rear window. His sight would have been obstructed by the top of the tender——

By Mr. Spicer:

Q. Is that the diagram you have on the left side?

A. Yes, marked "Side elevation."

Q. Rear window?

A. Yes, that is right, the back window, and then if he had chosen to look out the side window you will see a dimension there nine inches plus or minus which is the most that [fol. 74] he could have his eye projected beyond the side of the cab—his sight line from the side window would have been obstructed at the back corner of the tender which would have been that same ten inches from the edge of the step.

By Mr. Allen:

Q. If a man had been standing there, if a man five feet 4½ inches had been standing there on the end of that step, balanced and not reaching out, what, if any, obstructions would have been in the line of vision of the engineer looking out from the cab as far as he could well look out?

Mr. Spicer: I think the question should be confined to the physical measurements. I don't think he should be putting in where a man was.

By Mr. Allen:

Q. All right, follow the physical sight lines and continue with your testimony.

A. Do you mind restating the question, please?

Q. I am asking you with reference to the sight line from the eyes of the engineer as indicated in your top plan here toward the rear of the engine and what, if anything, would obstruct the view of a man standing on the step, the footboard?

Mr. Spicer: If Your Honor please, I don't want to interrupt, but it seems to me he is asking what the engineer could see without knowing where the engineer was except [fol. 75] saying he was sitting on the seatbox.

Mr. Allen: The engineer's hand was on the throttle and he was turning around in a position like this, turned around looking out with his hand on the throttle.

The Court: I think the evidence is proper. The objection is overruled.

Mr. Spicer: We submit that the witness cannot testify as to where the engineer's head was or eye was because he didn't see the engineer there and he didn't take any measurements of the man.

The Court: I understand the question is what obstruction was there between a person sitting on the engineer's seat and a person standing on the footboard.

Mr. Allen: That is correct.

The Court: Objection overruled.

A. If the engineer's eye was projected out the side window—that is the maximum he could look out and still have his hand on the throttle——

Mr. Spicer: I object to that, his characterization of the distance he can stick out. I don't mind giving us the esti-

The Court: I think that point is well taken. There might be a variation in engineers of different sizes.

By Mr. Allen:

Q. May I ask if you sat in the engineer's seat and tested the situation yourself?

A. I did.

Q. Tell us about your sight?

A. From a point nine inches outside of the space of the cab, the sight line is obstructed at the back end of the tender and you would have no vision within that ten-inch space between the step and the edge of the tender. From the edge of the platform it would be obscured.

Q. Have you indicated on your sketch that little back window you were talking about?

A. Yes, on the back elevation. It would be marked "Rear elevation". There it shows a back window of the cab. The window to the left is dotted because it is obscured from view by the top part of the tender.

Mr. Allen: We want to offer this one in evidence just to show that little back window.

Mr. Spicer: All right.

(The photograph was filed and marked Plaintiff's Exhibit No. 5.)

[fol. 77] By Mr. Allen:

Q. I hand you a photograph which has been marked Plaintiff's Exhibit No. 5 and will ask you if you can indicate to the Jury that little rear window you are talking about on No. 114.

A. That I think is on the other side of the engine, on the opposite side that we are talking about. This is the left side of the engine, this photograph.

Q. Point out that little window.

A. You can well see the back window, this little high window, and you can also see the side window.

Q. There has been introduced in evidence by the defendant company a photograph denominated Defendant's Exhibit B and there is a man standing on the footboard which we are talking about and someone looking out of the window and it has been testified that the person looking out of

the window can see a part of the body of that man. What have you to say about that?

Mr. Spicer: We object to that.

The Court: I supposed this is based upon the inspection of the engine by the witness?

Mr. Allen: Yes.

The Court: The objection is overruled.

By Mr. Allen:

Q. Did you make an inspection of this engine and make [fol. 78] tests to determine what could be seen back there in addition to your measurements in reference to the sight lines?

A. I did, sir. The man shown here is not balanced. We assumed that a man would be balanced on his own two feet. He is holding onto the grab iron here. Of course, he could stick out much further than that if he had chosen to lean out further, supporting himself by his arm.

Mr. Spicer: I object to these characterizations as to how a man should stand and whether he is balanced or not.

The Court: I think that point is well taken. Gentlemen—the testimony as to what would be the case when a man swings out as described by the witness.

By Mr. Allen:

Q. Did you make any tests similar or otherwise to the one on Defendant's Exhibit B for the purpose of determining actually what could be seen by a person in the position of the engineer, turning and looking back with reference to a person standing on the footboard? In other words, did you place anybody on the footboard?

A. I did, sir.

Q. In what position did you place him before you made your observation—standing upright?

A. Standing upright, his foot on the edge of the step [fol. 79] which was ten inches from the edge of the tender.

Q. A man standing straight?

A. Upright, straight. I could not see him when I put my head out of the side window.

Q. Did you put your head out as far as you could see?

A. As far as I could and still have my hand on the brake.

Q. The throttle?
A. The throttle, yes, sir.

Mr. Allen: We offer one of these maps in evidence, if Your Honor please. I don't suppose there is any necessity to offer but one.

The Court: Is there any objection?

Mr. Spicer: Yes, sir, we object to it.

The Court: What is the objection?

Mr. Spicer: We object to anything except actual measurements that he made.

The Court: I understood these were taken from measurements.

Mr. Spicer: I meant actual measurements.

Mr. Allen: That is all that is on it as far as I see.

Mr. Spicer: We object to the eye position there and the eye position of the different windows because that is variable.

[fol. 80] The Court: That, of course, is variable, Gentlemen. Mr. Allen, what do you say about the eye positions? That would vary with the height of different persons occupying the position.

Mr. Allen: I ask then that this witness be permitted to stand up by the engineer and let us see about their size. The witness said he put his head out as far as he could get it and still keep his hand on the throttle. That is exactly what Mr. Wilds said he did. Apparently, I don't see much difference between the two men.

By Mr. Allen:

Q. Do you know how tall you are?
A. Five feet 10½.

Mr. Allen: May we ask how tall Mr. Wilds is?

Mr. Spicer: That wouldn't show it. The variation may not necessarily be the same, but this gentleman is not shown to have been operating the engine or to know anything about operating engines. I don't take it he has operated this engine.

Mr. Allen: It goes to the weight, certainly not to the admissibility of it.

Mr. Spicer: He can tell what he saw from a certain position but when it comes to saying an eye position for what

everybody else could see, an experienced locomotive engi-
[fol. 81] neer, I submit——

The Court: Gentlemen, I shall admit the chart, saying to the Jury, however, that these locations referred to as eye positions, as I understand from the evidence, are the positions at which this witness, Mr. Torrence had his eye at the time the measurements were taken. That does not mean that they would be the same eye positions of a person of a different build or one who didn't lean as far out or one who leans farther out of the window than Mr. Torrence did. You gentlemen will understand that.

(The chart was filed and marked Plaintiff's Exhibit No. 6.)

By Mr. Allen:

Q. What did you say your height is?
A. Five feet ten inches and a half.

The Court: I think it goes to weight rather than the admissibility.

Cross Examination

By Mr. Spicer:

Q. I take it you are not a locomotive engineer?
A. No, sir.
Q. You have not operated locomotives?
[fol. 82] A. No, sir, I haven't.
Q. And you had no occasion to attempt to operate one?
A. No, I haven't.
Q. You didn't try to operate the locomotive down there the other day, did you?
A. No.
Q. When you made the observations?
A. These are engineering measurements.
Q. They are observations made by you from a certain position taken by you. Is that correct?
A. Exact measurements of this Engine No. 114.
Q. I don't question that, from certain positions taken by you and taken by somebody else?
A. Restate that, please.
Q. I think we were in accord about that. As long as these measurements were measurements taken from the

engine, that is all. You haven't had experience to know where you would be in operating an engine?

A. I have made measurements like these before, sir, for another railroad along with my regular duty.

Q. You haven't operated the engine?

A. No, I have not operated an engine. I am a civil engineer.

[fol. 83] Redirect Examination

By Mr. Allen:

Q. Do you civil engineers have any difficulty——

Mr. Leake: I make a motion to exclude the evidence on the ground that he has not been qualified as an expert on the subject on which he has been asked to testify.

The Court: The motion is overruled.

By Mr. Allen:

Q. Do you civil engineers have any difficulty setting up sights to determine a line of vision and whether there is any obstruction in that line, and that sort of thing? I mean do you have ways to do that in the engineering profession?

A. Yes. I did it here on a paper.

Q. And you have instruments and all that you use?

A. That is right.

By Mr. Spicer:

Q. From definite positions taken?

A. Yes. May I state this, sir? From the back window the back platform is totally obstructed. From the side window you could assume one foot, two foot, three foot or four feet and if a man were tall enough and stick out another foot, he would gain about a sixteenth of an inch at the back.

[fol. 84] Q. That would have a good deal to do with where the man on the back was standing, wouldn't it?

A. If he was standing on the step.

Q. What the man in the cab would see would depend very much on how the man in the back was standing?

A. If he was standing in an upright position he would be obstructed.

Q. Is that man standing in an upright position in the picture?

A. That man is not standing. You are speaking——

Q. The one showing the man standing on the back?

A. He is not in an upright position. He is supported by lateral force.

By Mr. Allen:

Q. What did you say about each time a man would lean out of that window a foot he would see how much of an inch back there?

A. Probably between a sixteenth and an eighth of an inch more within that ten inches obstruction. The ten inches I am speaking of is the ten inches from the edge of the step to the edge of the tender.

[fol. 85] Mr. Allen: I want to call Mr. Wilds back just a minute.

Samuel Emmett Wilds, recalled by the plaintiff, further testified as follows:

By Mr. Allen:

Q. How tall are you, Mr. Wilds?

A. Five foot, ten and three-quarters.

Mr. Allen: That is all.

Mr. Allen: May it please Your Honor, we rest with the exception of a view. I think I mentioned to these gentlemen last week that we wanted a view of this engine and tender and I believe they have it down there on the yard. I think that is a very essential part of our case.

Mr. Spicer: We would be very glad for them to have a view. The engine is in the yard. It is a little hard to get to.

The Court: What would be a good time to have the view, Gentlemen?

Mr. Spicer: We would like to give them a little notice because there are some movements back and forth.

The Court: Gentlemen of the Jury, be back here at a [fol. 86] quarter of two. Don't permit anyone to discuss it with you or in your presence. Be back at a quarter of two.

(At 12:45 a recess was taken until 1:45 p. m.)

The Court: Gentlemen of the Jury, counsel have agreed that in their opinion it will probably be helpful for you gentlemen to go down and examine the locomotive involved in this case and probably other locations. Mr. Marshal, have you arranged for transportation?

Marshal: Yes, sir.

The Court: The Marshal will take you gentlemen down there. Counsel are going.

Marshal: They are going in their own automobile and will show us the way to get there.

The Court: Gentlemen, while you are there you should not discuss this matter with any outsiders. It is not proper for you to do that. It is entirely proper for you to discuss it among yourselves and call each other's attention to anything you see which you think is of importance, but you should not permit any outsiders or anyone else except members of the Jury to talk to you about it.

Mr. Marshal, you will understand, of course, and enforce that.

Gentlemen, I understand the locomotive will not be at the point where the accident occurred, so it is merely the [fol. 87] locomotive itself which you will have an opportunity to examine—not the location of the accident.

(At 1:45 p. m. the Jury left and returned at 2:50 p. m.)

Mr. Allen: If Your Honor please, while you will take judicial notice of the American Experience Mortality Table, I believe it is customary to read the table to the Jury and we would like to read the table in this case. At 32 years of age, the expectancy is 33.92 years, according to the American Experience Table.

We rest.

Mr. Spicer: We would like to make a motion.

The Court: The Jury will retire to your room.

(The Jury retired.)

MOTIONS FOR DIRECTED VERDICT AND TO DISMISS

Mr. Spicer: Your Honor, we desire to make a motion for a dismissal of the case on the ground that on the facts under the law the plaintiff has shown no right to relief pursuant

to Rule 41 (b) which I believe is appropriate at the end of the plaintiff's evidence where you show no right to recover upon the facts and the law, which is applicable, I believe, both to cases tried by a jury and cases tried without a jury.

We submit that the evidence here has not proven that the defendant was negligent as to any duty owed to the [fol. 88] decedent or that any such negligence was the proximate cause, in whole or in part, of his injuries and death.

The evidence is insufficient to show that the defendant was in any way responsible for the decedent falling from the moving train and being injured or that its employees did anything to cause such injuries or could have avoided such injuries being sustained.

The evidence shows that the decedent's fall, so far as the defendant was concerned, was at most an accident which could not have been reasonably foreseen or anticipated or provided against, or that it shows that it was due to his own physical condition or due to his own negligence in some way by possibly giving up his hold or not having hold, or something like that, as the sole proximate cause of the injuries and death, and that the evidence affirmatively shows that this defendant performed every alleged duty it owed to the decedent in view of the nature of the business and the work which was carried on.

The crux of the plaintiff's charge of negligence here in the complaint is that he was in a safe position on the footboard and that by reason of some unprecedented or unexpected change in the manner of shifting, a sudden stop was made without giving the deceased warning which placed him in a position of extreme danger and the stop was made and caused him to fall, a sudden application of its emergency brakes, thereby causing the deceased to be thrown from [fol. 89] a position of safety on the rear of the tender upon the track in the path of the backing locomotive. In other words, they say that he was jolted off by this application of emergency brakes by the engineer and that that is what caused the accident. We submit there is no evidence whatsoever to show that.

We think Mr. Wilds has made a perfectly logical and clear statement of what happened. He has been examined previously by the plaintiff in a deposition and there is not

the slightest evidence to indicate that there was any reason for his applying the emergency brakes or slowing up or doing anything, that Mr. Moore was the man to give him a signal if there was anything to do because Moore was on the front of the engine, the way it was going, on the front end of the tender, and that he was the man to give him any signal if anything was required to stop it but he had been able to see himself that the lead track switch was open and that there was nothing coming in the other direction.

There has been no suggestion in the evidence that anything was coming in the other direction or there was anything to be done except to carry the cars on through the lead switch and there was everything being done in the usual way, according to Mr. Wilds. It was a regular method of transferring cars, bringing them out on the ladder track [fol. 90] in order to make a proper distribution of them. Certainly there was nothing unusual to a brakeman riding on the footboard of the engine. He was an experienced man of six years' experience and was familiar with that location and Mr. Wilds certainly had nothing against him. You cannot assume that Mr. Wilds deliberately would do something to throw him off the engine, and there is no evidence that he did.

But if you disregard Mr. Wilds' testimony, there still isn't any evidence to show that the brakes were applied before he fell off. There is nothing from Mr. Torrence's statement of an affirmative nature that would show that the brakes went on before the decedent fell off the engine. There couldn't be because he wasn't there and knew nothing about it.

The sequence just isn't there. That is the sole allegation of negligence. They say he was in a position of safety, that they failed to give him a warning of intention to stop suddenly, a hitherto unprecedented and unexpected change in the manner of shifting cars, that is, a sudden stop was to be made at the lead track, although it knew full well that such change would place the decedent in extreme danger. Nobody has come forward and said that Mr. Moore was there and that this jolt from putting on emergency brakes and doing what he could do to stop it knocked him off or that it was in any way connected with his going off [fol. 91] and Mr. Wilds certainly answered every question about that, that he put on the brakes because he saw the

man fall and did the only humane thing he could have done.

We submit that there is no affirmative evidence of any negligence that is alleged in this complaint to support the plaintiff's case and that at most it is an accident which could not have been prevented. Even conceding for the purpose of argument that he got out in some way of Mr. Wilds' sight, it does not show that he did anything to stop the engine until he saw him falling.

We submit there simply isn't sufficient evidence to support a verdict for the plaintiff and we move therefore under that rule for a dismissal and we also move for a directed verdict in accordance with Rule 50 upon the same grounds.

Mr. Allen: May it please Your Honor, the question before the Court is whether there is sufficient evidence here to submit this case to the Jury. We have endeavored to find and have found several cases which we think are squarely in point on the facts and the cases hold that when the plaintiff is forced to call the engineer, as we were in this case, it doesn't make any difference what the engineer says, if his testimony conflicts with proper inferences from proven facts, then the case is one for the Jury.

[fol. 92] Let us see what you have here; you have the admission in the answer and admitted in the testimony that this man was standing on the footboard acting in performance of his duty. You have it admitted in the testimony that the decedent was not in the act of giving any signal; he hadn't given any since he gave the back-up signal to start with. You have an emergency application of the brakes and you have the man falling off right where the emergency application was made and have him killed. You have the law which says, and there is no contradiction as to that, no difference of opinion, that an emergency application of the brakes without warning is negligence and if a man is knocked off or thrown off or falls off as the result of that application, then the company is liable.

You have the questions asked by Mr. Spicer of the engineer that there was no rough rolling, nothing happened to cause this man to fall at all. So then, if the Jury believe, which they will have a right to believe, that the engineer could not see this man and that he did not tell the truth when he said the man was standing straight and he saw him slump as if his knees were giving away and then saw

him straighten up—that is what he said. According to the testimony of Mr. Torrence—and the Jurors have seen the situation too and they would have a right to pass on it from their view—but, according to the testimony of Mr. Tor-
[fol. 93] rence, the engineer could not possibly have seen that. So when he applied his brakes in order to save this man, as he says, having seen the man go through those motions, if that is not true, he applied his brakes for some other reason and he says himself that there was nothing else to cause the man to fall.

Now, to take this case away from the Jury, you have got to guess and speculate that the man might have had a heart attack or something of that sort.

Let us see the reasoning of some of the cases that are in point.

The Court: Mr. Allen, I rather think what I should do is reserve decision on this motion until after the verdict. I have recently had occasion to examine the authorities in cases of this kind and I think that I should reserve decision.

Dr. Kinloch Nelson, called as a witness by the defendant and being first duly sworn, testified as follows:

Direct Examination

By Mr. Spicer:

Q. Doctor, will you state your name and residence and your qualifications as a physician and surgeon?

A. Kinloch Nelson, 608 West Franklin Street, Richmond,
[fol. 94] Virginia; graduated at the University of Virginia in 1927, passed the State Board the same year, and have been practicing in Richmond since 1929.

Q. Did you serve in the Medical Division of the Army in the late war?

A. I was in the 45th General Hospital from May '42 to discharge in '44.

Q. You are now engaged in practice in the City of Richmond?

A. Yes.

Q. Doctor, did you have occasion to examine Mr. Louis L. Moore, Jr., the decedent in this case?

A. I saw Mr. Moore on October 3, 1947, and daily thereafter until November 7, 1947. I can't recall whether I saw him a time or two after that in the office. During those dates he was in the hospital, between October 3rd and November 7th.

Q. Can you state what history was given by the patient?

Mr. Allen: Unless the history was given to this witness and this witness took the history, I shall object. In other words, I don't think this witness can give what the hospital records show unless he took the history himself.

By Mr. Spicer:

Q. Did you receive the history?

[fol. 95] A. I talked to Mr. Moore many times. The history that I obtained from him, so far as I recall, is substantially what is here in the record. I didn't make this actual record myself.

Q. Substantially, what was the history given by him in his conversations with you?

A. He was taken with this severe pain at 11:30 p. m., on the night—I think the day he came in, October 3rd—and this pain was very severe, in the lower chest, and moved into his neck and into the abdomen. Associated with this he had some feeling of numbness in his left arm and a few minutes later he fainted and had a large loose bowl movement. The City ambulance physician administered some medicine without any relief, gave further medicine without any particular relief, and brought him into the hospital.

Q. The dates you have given were in 1947?

A. Yes.

Q. What did you diagnose his trouble to be from?

A. He had suffered a clotting of the blood in one of the major arteries of the heart with subsequent loss of function of that portion of his heart so that it would take sometime for that area of the heart to heal and blood supply to be reestablished there.

Q. Was he kept in the hospital for that purpose?

A. Yes. We kept him in the hospital for a little over [fol. 96] a month.

Q. All in connection with this condition?

A. Yes.

Q. Was there any notation on the chart as to when he left what his condition was?

A. He left the hospital in good condition.

Q. Doctor, speaking as a physician, will you state it to be your impression or not whether a man who has had such an attack would be likely to have a recurrence of such attacks than someone who had never had that attack?

Mr. Allen: I don't think this gentleman has qualified as a heart specialist. If he hasn't, then I don't think he is competent to answer that question.

The Court: Ask him some more questions along that line.

By Mr. Spicer:

Q. Have you had any experience in the treatment of heart troubles?

A. I see a good many heart cases, yes.

Q. You treated this man at the Medical College?

A. Yes, sir.

Q. And how long has your experience in treating heart cases extended?

A. I have been treating heart cases and other cases too— [fol. 97] I haven't limited myself to heart cases—for years.

Mr. Spicer: I submit he is competent.

By Mr. Spicer:

Q. Will you state whether or not in your opinion as a physician a person who has had a severe attack such as this would be more likely to have an attack again than a person that never had such an attack?

A. I don't know the exact figures on that. They are well known, I am sure, but I believe that the liability is much greater in a person who has had a heart attack of this type to have another one than if they had never had one before. That is a matter of opinion.

Q. Speaking as a physician, if you had such an attack as this yourself, would you take any precautions thereafter?

A. I believe if I had such an attack I would be inclined to take it easy, whatever that may mean.

Cross Examination

By Mr. Allen:

Q. Doctor, referring to the history of this man which you took, did you also take his past history in reference to severe illnesses, operations or accidents?

A. Yes, sir.

Q. Did you find that he had not had any severe illnesses, operations or accidents?

[fol. 98] A. Yes, sir.

Q. And you discharged him on November 7, 1947, and he left the hospital in good condition?

A. Yes, sir.

Q. And you have not seen him from that day to this, have you?

A. I couldn't be positive. I have a vague recollection that he was in the office once or twice thereafter but I certainly didn't see him, I would say, after the first of the year, 1948, I don't believe.

Q. Didn't you write Mr. Meade Spicer here of counsel for the defendant, as follows: "Subsequently study of his case showed him to have had a coronary occlusion of the anterior type and he was kept under treatment in the hospital until November 7, 1947, on which day he left here in good condition. I did not see Mr. Moore after this."

A. That is right.

Q. If you wrote Mr. Spicer that upon his inquiry, you would probably think that is correct?

A. I cannot remember whether I saw Mr. Moore after he left the hospital, or not. I think I did see him once or twice in the office but I don't recall the circumstances of it nor do I have any record of it.

Q. Do you know whether or not he ever had any return of heart trouble?

[fol. 99] A. No, sir, I don't. My recollection of it, the last time I saw Mr. Moore, whether it was in the office or in the hospital, he was getting along very well.

Q. Do you know whether or not he worked regularly without any complaint of any kind?

A. No, sir, I do not.

Q. Did you visit him in his home or were you called to see him any more after that?

A. As far as I can recollect it, I did not see Mr. Moore after he left the hospital but it is possible that I saw him in the office once or twice in the ensuing month or so.

Q. Were you at that time in the employ of the C. & O. Railway Company?

A. No, sir.

Q. Are you now?

A. No, sir. At that time I was an employee of the C. & O. Hospital Association which is an employees' association.

Q. Did you ascertain the age of this young man?

A. Yes, sir.

Q. Did you find him otherwise generally in good condition?

A. Yes, sir.

Q. I believe his age was about 30 at that time?

A. Thirty-one.

[fol. 100] Q. Did you know whether this man went back to work or not?

A. Mr. Allen, I just don't remember. I have a vague recollection, and no record of it, that he was in the office a time or two after he left the hospital and I remember that the last time I saw him, where ever that was, he was getting along very well. What we discussed concerning what he should do and all, I cannot recall and there is no record of it in here nor do I have any at the office.

Q. You don't recall advising him not to go back to work?

A. No, sir, I can't recall advising him anything.

Mr. Spicer: We rest, Your Honor.

The Court: Any rebuttal, Mr. Allen?

Mr. Allen: No, sir, we have no rebuttal.

The Court: Gentlemen of the Jury, I will excuse you until tomorrow morning at ten o'clock. In the meantime you should not discuss this case with anybody nor permit anyone to discuss it with you or in your presence. Be back at ten o'clock tomorrow.

Renewal of Motions for Directed Verdict and to Dismiss

Mr. Spicer: We renew our motion for a directed verdict for the defendant and for dismssal upon the grounds heretofore stated.

[fol. 101] The Court: I shall reserve decision upon those motions until after the verdict.

(At 4:15 p. m., the further hearing of this case was adjourned until ten a. m., January 31, 1950.)

[fol. 102] Richmond, Virginia,
January 31, 1950.

Met pursuant to adjournment.
Appearances: As heretofore noted.

In Chambers:

Mr. Spicer: Further in support of our motion for directed verdict for the defendant, we submit that there is no evidence whatsoever to show that the brake was applied to the engine in this case prior to the decedent falling from the engine, or no evidence in the case to reasonably support any such inference.

In Open Court:

(Thereupon arguments were made on behalf of the plaintiff and defendant to the Jury.)

[fol. 103] Charge to the Jury

At this point in the proceedings as has been our custom, it is the responsibility of The Court to charge you or advise you with respect to the principles of law that should guide you in your deliberations in arriving at a verdict.

As you very doubtless know, the first thing you do when you retire to your room is to select one of your number as Foreman. The Foreman votes as any other member of the Jury. His principal function as Foreman is to preside over deliberations of the Jury, to see to it that each Juror has an opportunity to voice and express his views in an orderly manner and it is also your duty to sign as Foreman such verdict as you may return.

As in all cases, in this case you are the sole judges of the facts and nothing which I have said during the progress of the trial or nothing which I may say is to be considered by you as indicating an opinion on my part with respect to the facts. In considering the facts you are also the sole judges of the evidence and the weight to be given to the evidence. You should give to the testimony of the wit-

nesses such weight as you as men of judgment would give to affairs in your ordinary business life. You are the judges of the credibility of the witnesses and the importance or the pertinency of any testimony. You have had an opportunity through the trial to observe the witnesses [fol. 104] and in giving weight to their testimony or considering it you should take into consideration their appearance or demeanor on the stand, any interest or bias or lack of interest or bias, opportunity to observe the things to which they testified and any other matters of that kind which you would consider in your every day transactions.

As you have been told, this is an action for damages brought by the plaintiff Viola Hall Moore Administratrix of the estate of her husband against the Chesapeake and Ohio Railway Company. The action is brought under the provisions of what is known as the Federal Employees Liability Act which is an Act of Congress. That Act makes the railroad company liable in damages to an employee suffering injury because of his employment as a result in whole or in part, of the negligence of any of the employees of the railroad company. If an employee loses his life in the course of his employment as a result, in whole or in part, of the negligence of any of the employees of the railroad company, that Act makes the company liable in damages to the personal representative of the deceased employee, the administratrix in this case, for the provision for those persons dependent on him. Neither assumption of risk by employee nor his contributory negligence constitutes a bar to the action, although I shall discuss later the [fol. 105] effect of contributory negligence.

While that does not make the defendant railroad company an insurer of the safety of its employees, it does make the company liable if the injury or death as the case may be, resulted in whole or in part from negligence of the company or any of its employees.

In order for the plaintiff to recover under this Act, it is incumbent upon him to prove, or upon her to prove in this case, by a preponderance or the greater weight of the evidence that the defendant or one or more of its employees was negligent in some manner as alleged in the complaint, and that such negligence was the proximate cause, in whole or in part, of the injuries sustained by the decedent, which

resulted in his death. Unless that is proven, Gentlemen, your verdict should be for the defendant.

The issue of negligence is one for you to determine according to your finding of whether the employer's conduct, that is the railroad's conduct, the acts of its employees, measures up to what a reasonable and prudent person would have done under the circumstances then existing. You shall hold the company liable if conditions under its control are not such as a reasonable man ought to maintain in the circumstances. Bear in mind that standards maintained must be commensurate with work required to be done.

Negligence, as that term is used in this Act, is defined [fol. 106] as the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances in the case or the doing of what any reasonable or prudent person would not have done under such circumstances. Before an act of negligence may constitute the proximate cause of injury or death, it must be shown that the injury was the natural or probable consequence of such negligence or that a reasonable or prudent man could foresee that the injury might naturally result from such negligence.

Negligence cannot be presumed or inferred from mere occurrence of the injury in question. The burden is upon the plaintiff affirmatively to prove by a greater weight or preponderance of the evidence that the defendant or its agents or employees were in fact negligent and that such negligence was in whole or in part the proximate cause of the injury to plaintiff's decedent which resulted in his death.

If the plaintiff has failed to prove these facts by a preponderance or the greater weight of the evidence, then the railroad company is not liable in the case.

If you should decide that the company or any of its employees was negligent and that such negligence was the proximate cause of the plaintiff's injury, you will then have to consider whether plaintiff was also negligent, that is, whether he was guilty of contributory negligence or negli- [fol. 107] gence contributing to his injury.

While the burden is upon the plaintiff to prove by a preponderance of the evidence that defendant company was negligent, or one of the employees of defendant company

was negligent, and that such negligence was the proximate cause of the injury or death, the burden is upon defendant company to prove the plaintiff was negligent unless such negligence is shown by plaintiff's own evidence or may reasonably be inferred from all the facts and circumstances in the case.

Unlike many cases involving claims based upon charges of negligence, under the Federal Employers Liability Act if both the railroad company and the decedent, Mr. Moore, were negligent, and the negligence of the two combined to bring about the injuries resultng in Mr. Moore's death, the plaintiff is nevertheless entitled to recover, but in that event you are required to diminish her damages in proportion to the amount of negligence attributable to Mr. Moore.

In considering whether Mr. Moore was also negligent, you are to use the standard of how a reasonable and prudent workman would act under the same or similar circumstances, in other words, whether he acted as a reasonable and prudent man would have acted under the circumstances. If you find he was negligent and his negligence was the sole cause, then the plaintiff is not entitled to [fol. 108] recover anything against the defendant in the case, or should you be of the opinion that his injuries and death were solely due to an accident which could not have been foreseen or anticipated by the defendant, or should you believe that his fall from the locomotive tender was due to either his physical condition or his own negligence, and that either or both of these were the sole proximate cause of his injuries and death, then your verdict should be for the defendant. That is to say, in other words, if you believe from the evidence it is just as probable that the injury to the plaintiff or to Mr. Moore resulting in his death may have resulted from any number of several causes, for some of which the railroad company was responsible and for some of which it was not responsible, you may not speculate or guess between these causes or find that the negligence of the defendant company was in whole or in part the real cause but under such circumstances you are told the plaintiff has failed to establish her case and the defendant is not liable.

Under this Act to which I referred, that is the Federal Employers Liability Act, the company is responsible for

the negligent acts, if any, of its workmen. That is to say, if other employees of the company were careless and did not act as a reasonable and prudent workman or workmen would have, then the company would be legally responsible [fol. 109] for such carelessness on the part of such employee or employees, if it was the proximate cause of the injury or death. Gentlemen, that is true due to the fact that a corporation can act only through its employees, officers and agents.

If you believe from the evidence that plaintiff's decedent, Mr. Moore, was at the post of duty standing on the footboard of the tender from which he fell and that he had not commenced to fall until the engineer applied the brakes and shut the throttle off and brought the engine to a sudden and unusual stop, and that such action was without notice to Mr. Moore, then it was a negligent action which caused Mr. Moore to fall down and you should find for the plaintiff.

On the other hand, if you find, as I said a moment ago that Mr. Moore fell either through fault of his own or due to his physical condition or for any other reason not attributable to negligence on the part of the railroad company, then your verdict, of course, should be for the defendant.

In this connection you are told that the defendant company was not the insurer of the safety of the plaintiff decedent and was only required to exercise ordinary care to provide the decedent Mr. Moore with a reasonably safe place in which to work and to operate his engine and cars with reasonable regard for the safety of this employee and if you believe from the evidence such care as required [fol. 110] was exercised by the company, then your verdict should be in favor of the defendant.

The duty of reasonable care which the defendant owed to the plaintiff's decedent owed for his own safety and any failure on his part to exercise such care under the circumstances would be negligence on his part.

In considering your verdict you must not allow sympathy which you may feel for any person or persons to influence your verdict. A verdict either on the question of liability of the defendant or on the amount of damages should not rest upon surmise, sympathy or conjecture, but must be based upon the evidence before the Jury and the law as explained to you in the charge of the Court.

In the event you find the verdict for the plaintiff, the

damages recoverable would be such pecuniary benefit which the wife and children of the deceased reasonably might have received had he not died from his injuries. In determining pecuniary loss to children, the damages may include loss of care, counsel and education which they might have reasonably received from the father and which can only be supplied by services of another for compensation, to such other person.

Now, Gentlemen, I have discussed in considerable detail the principles of law which are to guide you. The issue [fol. 111] which you have before you is very narrow. It boils down to this: If you believe from the evidence that Mr. Moore was thrown from the tender as a result of the sudden stop or violent jerk which resulted from the unexpected application of brakes, then you may conclude that the defendant railroad company is liable for negligence. On the other hand, that is the only charge of negligence contained in the complaint. Unless you believe that, your verdict should be for the defendant.

Gentlemen, are there any other matters or facts which I have omitted?

Mr. Allen, Sr.: I don't believe, Your Honor, that you mentioned the apportionment of the verdict.

The Court: If you should find for the plaintiff, you should apportion such amount as may be awarded between the widow and the four children.

Gentlemen of the Jury, I suggest you now retire to your room. If you desire any of the exhibits you may either take them with you at this time or the Marshal will bring them to you.

(The Jury retired.)

The Court: Gentlemen, I suggest you state for the record any objections to the charge.

Of course, it is understood that the objections stated by counsel in Chambers are considered now as of this time [112] in accordance with the rules or at least considered as made in accordance with the rule at whatever time they are made.

If there is nothing further the Court will recess until the Jury returns.

(Note: The Jury returned a verdict in the following words:)

"We, the Jury, find for the plaintiff in the amounts as follows:

"$10,000.00 (Ten thousand dollars) to the widow, Viola Hall Moore;

"$6,000.00 (Six thousand dollars) to each of the four minor children;

"A total of $34,000.00 (Thirty-four thousand dollars).

"Signed, William R. Vaughan, Foreman, Dated January 31, 1950."

The Court: Are there any comments with respect to the form of the verdict? Any motions?

Mr. Allen, Sr.: Would it be better to let the verdict read, "We, the Jury of the issue joined, find for the plaintiff in the amount of $34,000.00 (Thirty-four thousand dollars), $10,000.00 to the widow, and $6,000.00 (Six thousand dollars) to each of the children."

[fol. 113] Mr. Spicer: We request a poll of the Jury.

(Each juror's name was called and asked if that was his verdict and each juror answered in the affirmative.)

The Court: Perhaps it would be better for the verdict to read: "We, the Jury upon the issue joined, find for the plaintiff and assess her damages in the amount of $34,000.00 (Thirty-four thousand dollars) to be apportioned as follows:"

Mr. Allen, Sr.: I believe you should name the children.

The Clerk (Reading verdict): "We, the Jury upon the issue joined, find for the plaintiff and assess her damages in the amount of $34,000.00, to be apportioned as follows:

"$10,000.00 to the widow Viola Hall Moore; and $6,000.00 to each of the four children, Carolyn Virginia Moore, Louis Lee Moore, III, Faye Lorinda Moore, Maxine Marie Moore."

The Jury was thereupon excused from further consideration of the case.

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MOTIONS TO SET ASIDE VERDICT AND FOR NEW TRIAL

Mr. Spicer: Your Honor please, we desire to renew the motions we have made at the conclusion of the plaintiff's evidence and at the conclusion of all the evidence and to move to have the Court set aside the verdict and any judgment entered thereon set aside and have judgment entered [fols. 114-125] in accordance with the previous motions.

I desire also to move for a new trial and that the verdict is contrary to the law and evidence and without evidence to support it and damages awarded are excessive. We will set forth that motion in a written motion within the ten-day period.

[Reporter's certificates to foregoing transcript omitted in printing.]

[fol. 126] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title Omitted]

MOTION OF DEFENDANT THAT THIS ACTION BE DISMISSED AND THAT THE VERDICT OF THE JURY AND ANY JUDGMENT ENTERED THEREON BE SET ASIDE AND THAT JUDGMENT BE ENTERED IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT, AND IF SAID MOTIONS BE NOT GRANTED, THE MOTION OF DEFENDANT FOR A NEW TRIAL—Filed Feb. 2, 1950.

The Defendant moves for a dismissal of this action on the ground that upon the facts and law the Plaintiff has shown no right to relief, and also moves that the verdict returned by the jury and any judgment entered thereon both be set aside and that judgment be entered in favor of the Defendant, in accordance with its motion for a directed verdict made at the conclusion of the Plaintiff's evidence and renewed at the conclusion of all *of all* of the evidence, and assigns as grounds of its said motions, the following:

1. Evidence insufficient to show that defendant was negligent as to any duty alleged to be owed to the decedent,

or that any such negligence was a proximate cause in whole or in part, of his injuries and death.

[fol. 127] 2. Evidence insufficient to show that Defendant was responsible for decedent's falling from the moving engine and being injured, or that its employees could have done anything to have averted the injuries sustained by him.

3. Evidence shows that decedent's fall from the engine was due either to his physical condition or to his own negligence, and that either or both of these were the sole proximate cause of his injuries and death.

4. Evidence shows at most that decedent's injuries and death were due to an accident which could not have been reasonably foreseen, anticipated or prevented by Defendant.

5. Evidence affirmatively shows that the Defendant fully performed every alleged duty owed by it to decedent, in view of the nature of its business and the dangers necessarily incident thereto, and further shows that the work was being done in the usual and customary way.

6. Evidence shows without contradiction that decedent's fall from the engine preceded the application of the brake by the engineer, and that there was no unexpected change in the manner of switching prior to decedent's fall from the engine, as alleged in the Complaint.

In the event that the foregoing motions should be overruled, the Defendant moves that said verdict be set aside and that a new trial be awarded, and assigns as grounds of its motion, the following:

1. Verdict is contrary to the law and the evidence and without evidence to support it.

2. The Court erred in overruling Defendant's objections to evidence of witness Carl Torrence, and in overruling [fol. 128] the motion of the Defendant to exclude the said testimony.

3. Damages awarded by the jury are excessive in amount.

Meade T. Spicer, Jr., Walter Leake, Attorneys for the Defendant, Address: Room 1103, Mutual Bldg., Richmond 19, Va.

CERTIFICATE

I hereby certify that a copy of the above Motion was served on George E. Allen and George E. Allen, Jr., attorneys for the Plaintiff, on the 2nd day of February, 1950, by delivering a copy thereof to George E. Allen, attorney for the plaintiff, in person.

Meade T. Spicer, Jr., Attorneys for Defendant.

[fol. 129] UNITED STATES DISTRICT COURT
Eastern District of Virginia
Richmond 6, Virginia

February 20, 1950

George E. Allen, Esquire
Mutual Building
Richmond, Virginia
Leake and Spicer, Esquires
Mutual Building
Richmond, Virginia

Gentlemen:

Re: Viola Hall Moore, Admrx. of Estate of Louis Lee Moore, Jr., Deceased—Richmond Civil Action #1023.

Receipt is acknowledged of Mr. Allen's letter of February 11, 1950, citing additional authorities to be considered in connection with defendant's motion for a directed verdict in the above case.

Upon further consideration of the motion it is my opinion that it should be granted since I do not find any evidence of negligence on the part of the defendant.

The case of *Zumwalt* v. *Gardner*, 160 Fed. (2d), 298, relied upon by the plaintiff, appears to be clearly distinguishable from this case. There the plaintiff testified that the engine was stopped suddenly, jarring him from the footboard. This was denied by the engineer. In this case the only evidence concerning the sudden stop was to the effect that the decedent fell from the train before it was brought to a stop and that the sudden stop was made because the engineer saw the plaintiff fall while the train

was moving. To sustain a verdict in this case it would be necessary to believe that the sudden stop was made before the plaintiff's decedent fell and there is no evidence of any kind to support this contention.

[fol. 130] It is argued in behalf of the plaintiff that the engineer could not have seen the decedent before he fell. If this is correct it does not weaken the defendant's case. There was no evidence of any obstruction or other reason for the engineer to apply the brakes until he saw the decedent fall and certainly there is no evidence whatever that the engine was brought to a stop before this occurred.

I have examined the cases of *Tiller* v. *Atlantic Coast Line Railway*, 318 U. S., 54; *Lavender* v. *Kurn*, 327 U. S., 645; *Tennant* v. *Peoria*, 321 U. S., 29, and other cases decided under this act. They present fine points of distinction but from language used it would seem that the proper rule might be stated substantially as: When conduct of the defendant is shown from which it is reasonably possible to infer negligence and casual relationship between such negligence and the injury, the case should be submitted to the jury who are the sole judges of the issue of fact. However, as I understand the cases, there must be shown some act or conduct from which it is reasonably possible to infer negligence.

Applying this test to the facts of the instant case, it is my opinion that there is no evidence upon which the question of negligence should have been submitted to the jury.

It is suggested that counsel for the defendant prepare and submit to counsel for the plaintiff draft of an order sustaining the motion for a directed verdict.

Very truly yours,

Sterling Hutcheson, United States District Judge.

[fol. 131] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

CIVIL ACTION #1023

VIOLA HALL MOORE, Adm'r. of the Estate of LOUIS LEE MOORE, deceased, Plaintiff

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Defendant

FINAL JUDGMENT—Filed February 27, 1950

This cause came on for trial before the Court and a jury on the 30th and 31st days of January, 1950, both parties appearing by counsel, and the defendant having moved for a directed verdict in its favor at the close of all of the evidence, on the ground, among others, that there was no evidence to support the plaintiff's allegation of negligence on the part of the defendant, and the Court, acting pursuant to Rule 50 of the Federal Rules of Civil Procedure, having reserved decision on the aforesaid motion for a directed verdict and submitted the action to the jury, subject to a later determination of the legal questions raised by the aforesaid motion for a directed verdict, and the jury on the 31st day of January, 1950, having returned a verdict for the plaintiff in the amount of $34,000.00, and the defendant within 10 days after reception of the verdict of the jury in favor of the plaintiff, having moved to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with its aforesaid motion for a directed verdict, which said motion of the defendant and the grounds thereof were stated in writing and filed in open Court, in the presence of counsel for both parties, on February 2, 1950; and the Court, after [fols. 132-133] due consideration, now being of opinion for reasons stated in writing, in a letter addressed to counsel for the respective parties, dated February 20, 1950 and filed with the record, that there is no evidence to support the plaintiff's allegation of negligence on the part of the defendant, and that the judgment should therefore be

entered as if the requested verdict for the defendant had been directed, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said verdict for the plaintiff be and the same hereby is set aside and annulled; that the plaintiff take nothing in this case, that the action be and it hereby is dismissed on the merits, that the defendant have and recover from plaintiff its costs by it about its defense in this behalf expended, and that the defendant have execution therefor.

Sterling Hutcheson, United States District Judge.

February 27, 1950.

I ask for this.
Meade T. Spicer, Jr.

Seen and objected to on grounds heretofore assigned.
Geo. E. Allen.

[fol. 134] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

NOTICE OF APPEAL—Filed March 14, 1950

Notice is hereby given that Viola Hall Moore, Adm'r. of the Estate of Louis Lee Moore, deceased, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment entered in this action on the 27th day of February, 1950.

Geo. E Allen, Sr., Geo. E. Allen, Jr., Attorneys for the appellant, Viola Hall Moore, Adm'r., etc., 611 Mutual Building, Richmond, Virginia.

A copy of this Notice of Appeal mailed Meade T. Spicer, Jr., Esq., Attorney, this 14th day of March, 1950.

Glover N. Buck, Deputy Clerk.

[fol. 135] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

DESIGNATION OF RECORD—Filed March 21, 1950

Appellant designates the complete record and all the proceedings and evidence to be contained in the record on appeal in this action. One copy of the reporter's transcript of evidence and court proceedings, in addition to the original heretofore filed with the clerk, is filed herewith. Dated, March 21, 1950.

Geo. E. Allen, 611 Mutual Building, Richmond, Virginia.

Geo. E. Allen, Jr., 611 Mutual Building, Richmond, Virginia, Attorneys for Appellant.

I hereby certify that a copy of the above designation was served on Walter Leake, Esquire, and Meade T. Spicer, Jr., Esquire, 1103 Mutual Building, Richmond, Virginia, attorneys of record for Appellees, by leaving same with the clerk in their office, in accordance with the provisions of Rule 5 (b) of the Federal Rules of Civil Procedure, this 21st day of March, 1950.

Geo. E. Allen, Geo. E. Allen, Jr., Attorneys for Appellant.

[fol. 136] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

STIPULATION AS TO RECORD—Filed March 24, 1950

It is hereby stipulated between counsel for the respective parties that the record on appeal in this action shall include the following:

Praecipe filed in behalf of the plaintiff on January 24, 1950 for the attendance of the witnesses Oscar P. En-

roughty, W. R. Gibson and A. L. Holland and subpoenas issued and returned thereon.

Walter Leake, Meade T. Spicer, Jr., Attorneys for the Defendant.

Geo. E. Allen, Attorney for the Plaintiff.

[fol. 137] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

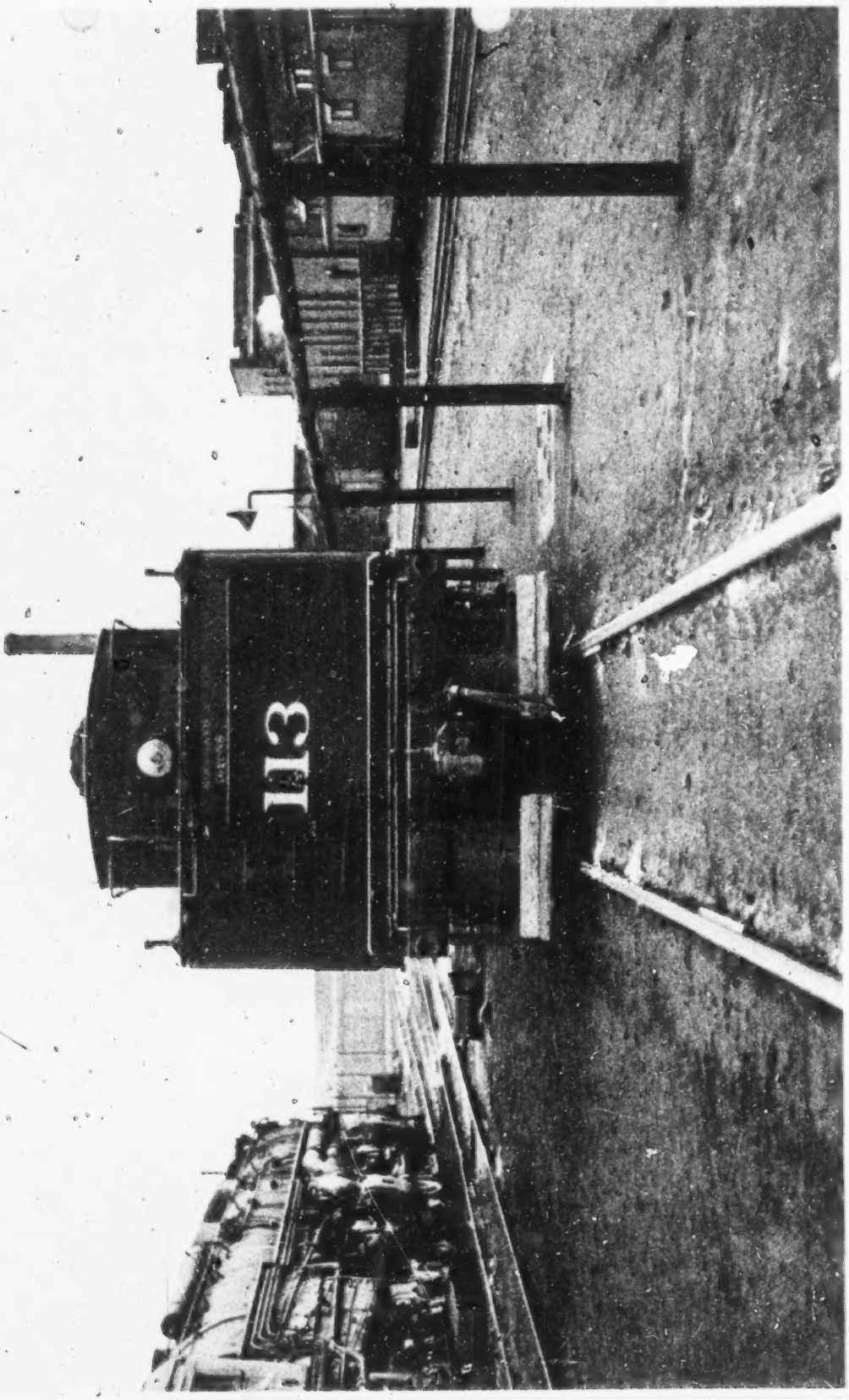
STIPULATION AS TO RECORD—Filed March 24, 1950

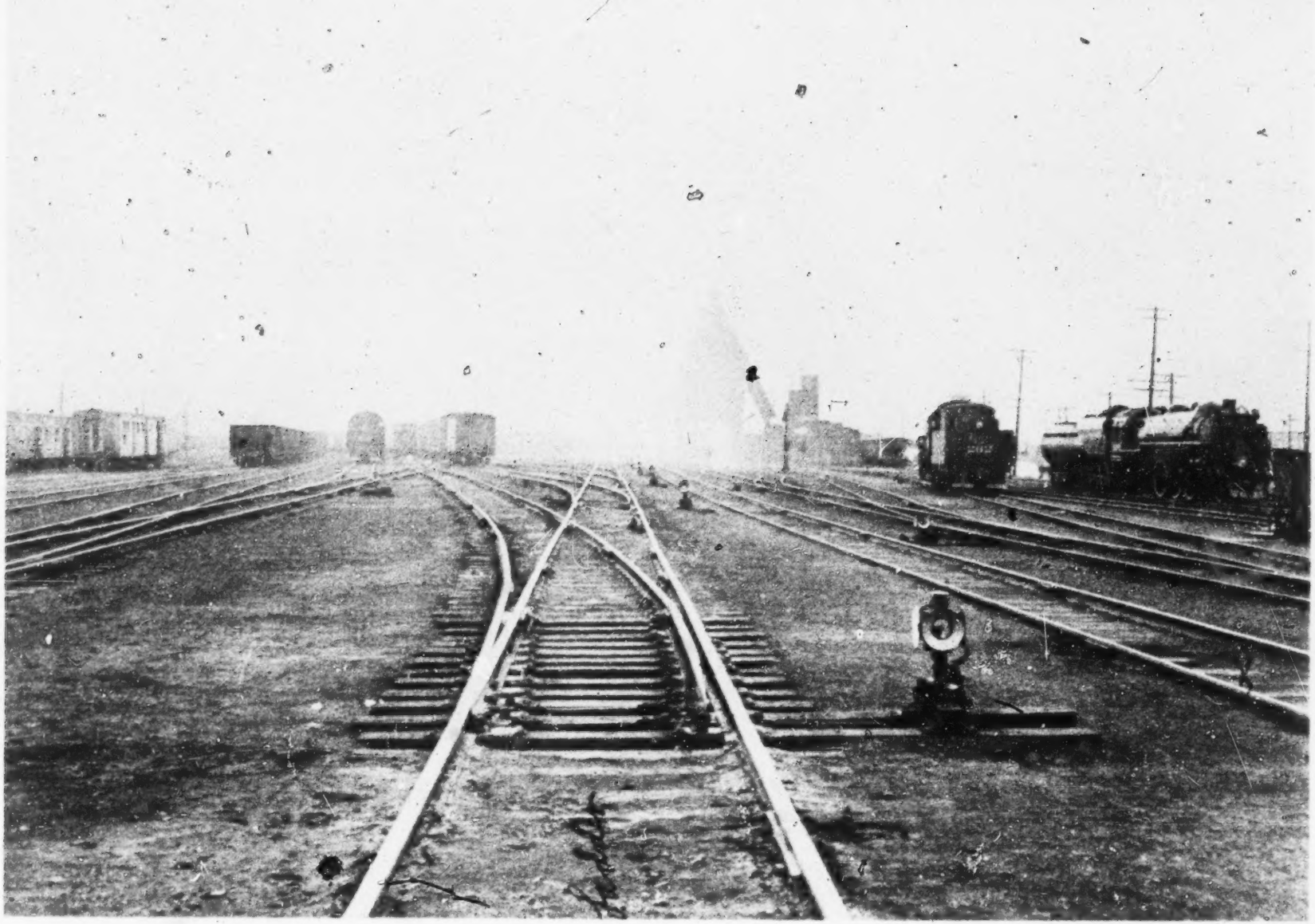
It is hereby stipulated between counsel for the respective parties that the record on appeal shall show that the deposition of the witness S. E. Wiles, which was filed on January 19, 1950, was taken by the plaintiff on September 2, 1949.

Walter Leake, Meade T. Spicer, Jr., Attorneys for the Defendant.

Geo. E. Allen, Attorney for the Plaintiff.

PLAINTIFF'S EXHIBIT NO. 1





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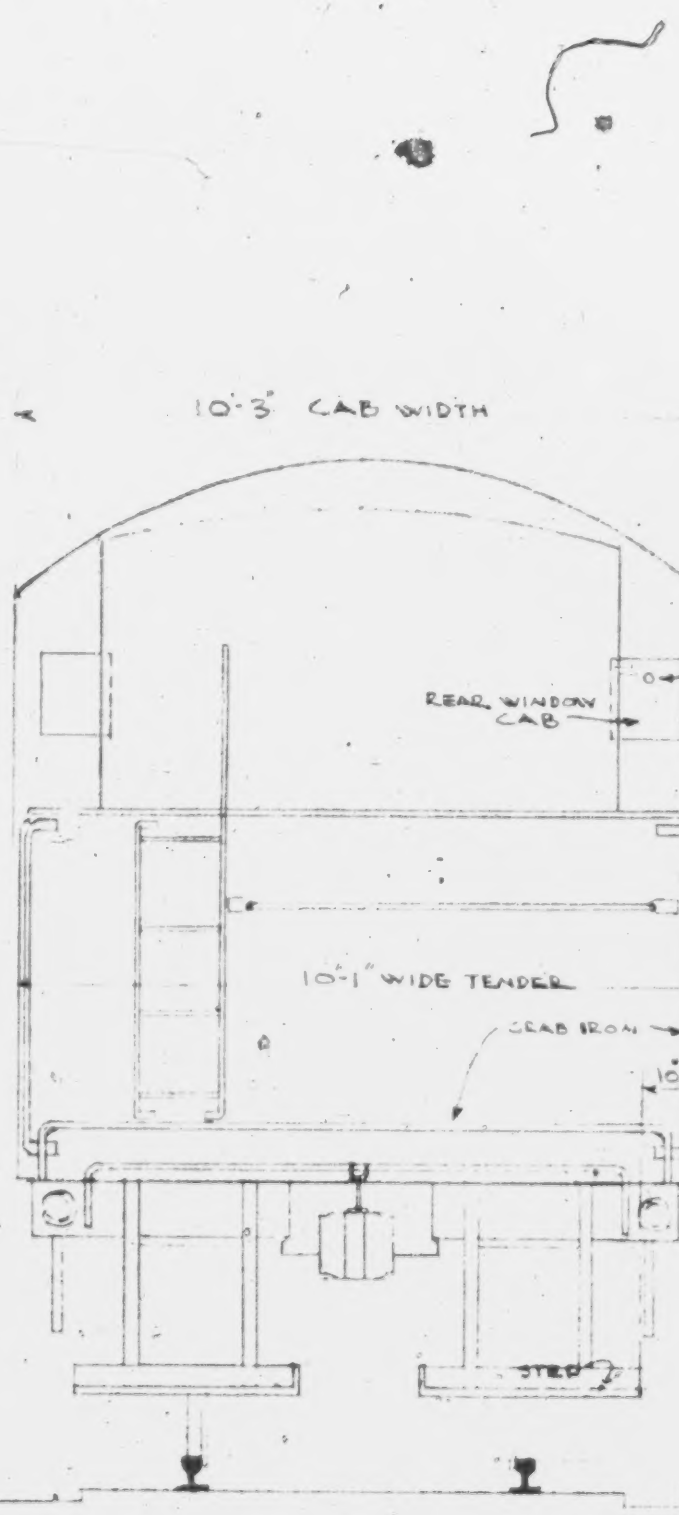
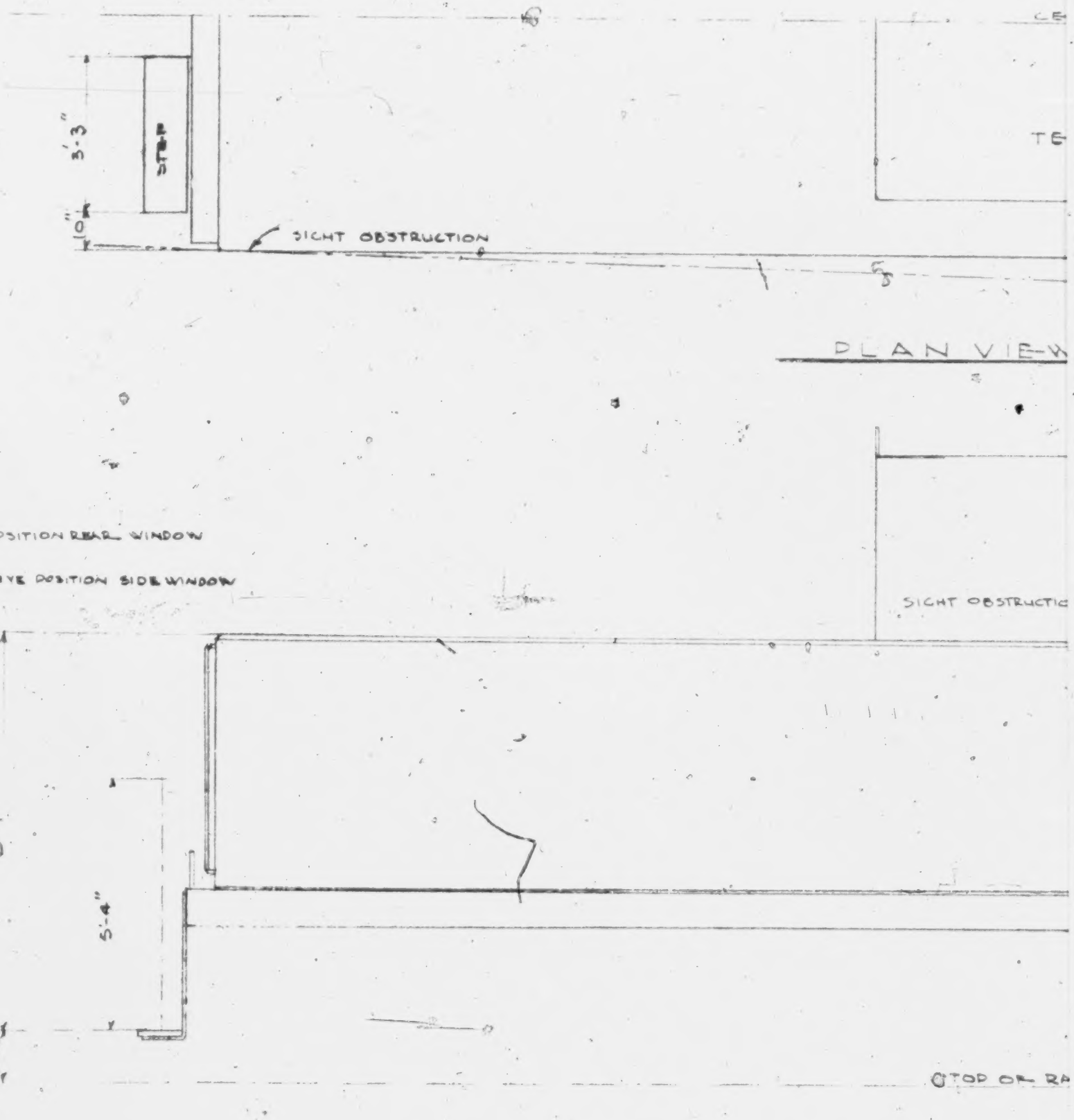


REAR ELEVATION



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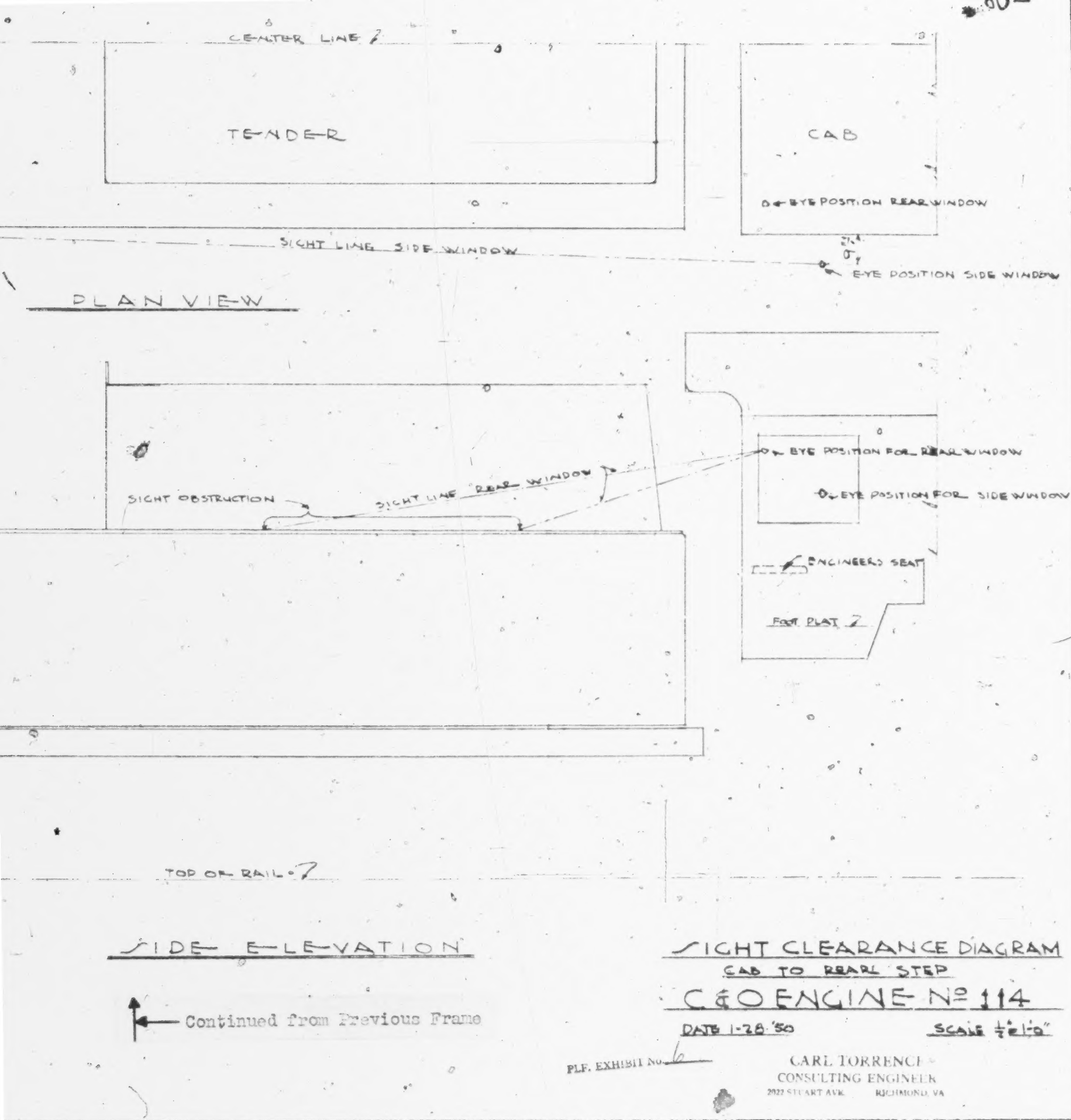


SIGHT CLEARANCE DIAGRAM

CAB TO REARL STEP

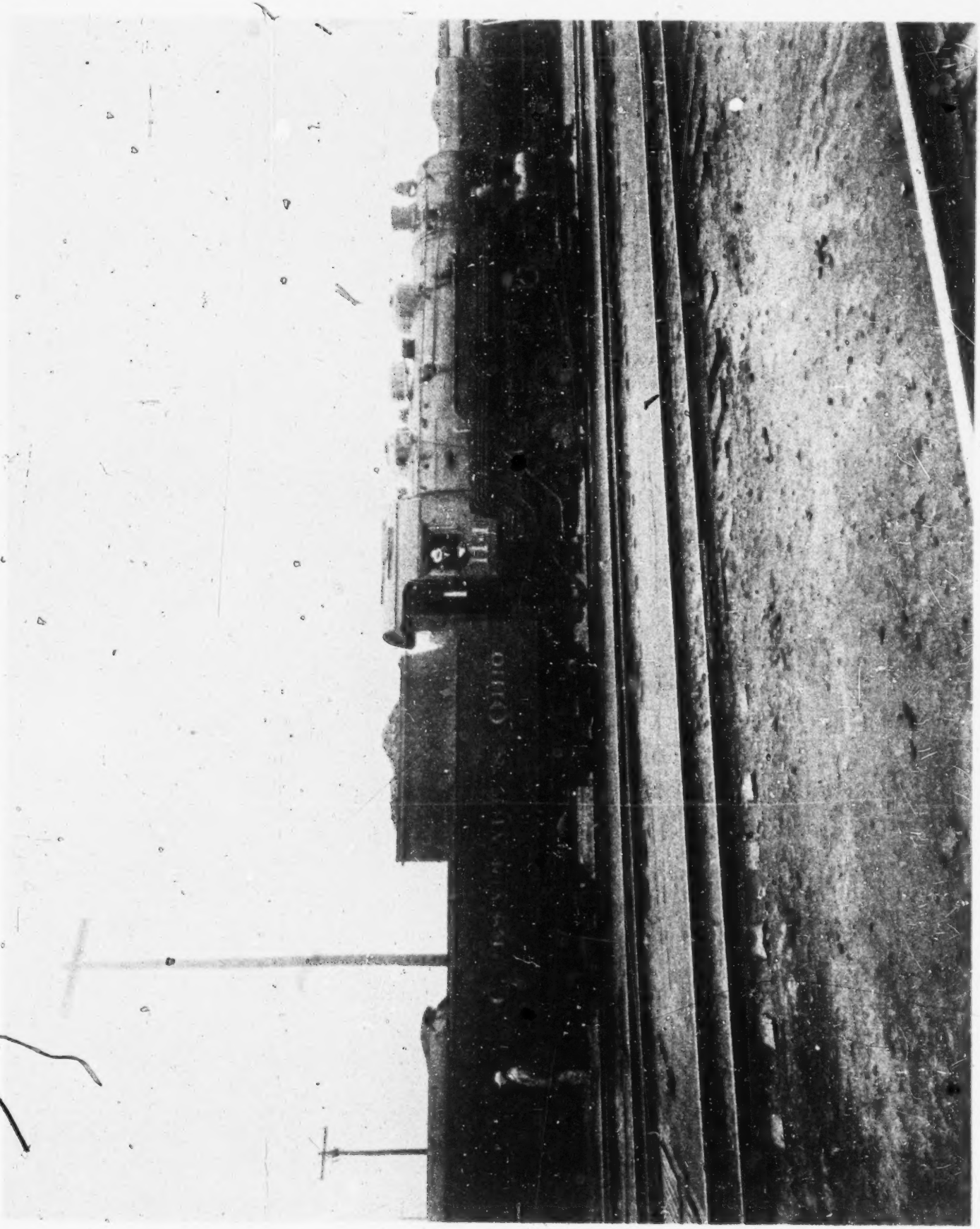
C&O ENGINE No 114

DATE 1-28-'50 SCALE ½"=1'-0"

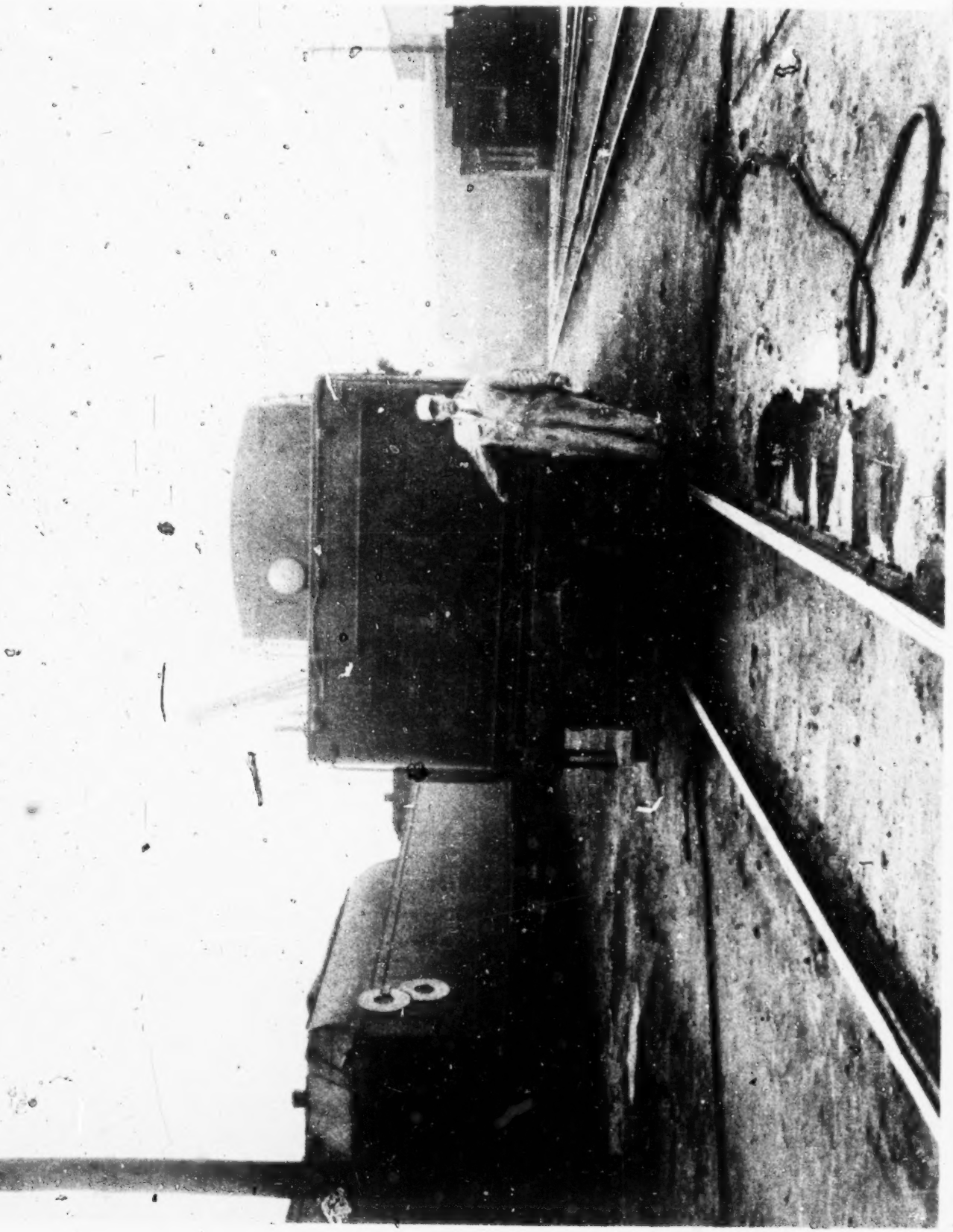
PLF. EXHIBIT No. 6

CARL TORRENCE
CONSULTING ENGINEER
2022 STUART AVE. RICHMOND, VA

DEFENDANT'S EXHIBIT "A"



DEFENDANT'S EXHIBIT "B"



[fol. 146] IN UNITED STATES DISTRICT COURT

RELEVANT DOCKET ENTRIES

July 18, 1949	Complaint filed 7/18/49.
July 29, 1949	Motion and Notice of Motion to strike and more definite statement be supplied filed 7/28/49.
Aug. 8, 1949	Answer of defendant filed 8/8/49.
Aug. 16, 1949	Notice to take deposition of Edward Wiles filed by plf's. Atty. 8/16/49.
Oct. 31, 1949	Order Requiring more definite statement and/or that certain wording shall be stricken from the complaint, ent. and filed 10/31/49.
Jan. 19, 1950	Deposition of Edw. Wilds on behalf of plaintiff, filed 1/19/50.
Jan. 25, 1950	Plaintiff's Praecipe for Three Subpoenas filed 1/25/50—Issued 1/25/50.
Jan. 26, 1950	Marshal's return on subpoenas for Dr. Lefon, Enroughty, Gibson & Holland, "executed", filed 1/26/50.
Jan. 30, 1950	*Trial Proceedings:* Appearance of parties and jury. Issue joined. Jury sworn and examined on Voir Dire. Jury duly impaneled and sworn to try issue. Evidence on behalf of plaintiff and plaintiff rested. Defendant moved for Dismissal under Rule 41b and for Directed verdict under Rule 50. Motions argued and decision reserved until after verdict. Evidence on behalf of Defendant and defendant rested. Evidence concluded. Defendant's motion to Dismiss and for Directed verdict renewed and decision reserved until after verdict. Adjournment.
Jan. 31, 1950	*Trial Proceedings:* Appearance of parties and jury. Argument. Charge. Jury retired and returned into Court and rendered its written verdict in favor of plaintiff in amount of $34,000.00. Jury discharged. Defendant renewed motions heretofore made and also moved to set aside verdict and enter judgment in ac-

Jan. 31, 1950 cordance with previous motions and for new trial. Motions taken under advisement.

Feb. 2, 1950 Defendant's written motion that action be dismissed; that jury verdict be set aside and that judgment be entered in accordance with motion for directed verdict and for new trial, filed 2/2/50.

Feb. 24, 1950 Opinion sustaining Defendant's motion for Directed verdict, filed 2/20/50.

[fol. 147] Feb. 27, 1950 Order setting aside jury verdict, entering judgment for defendant, dismissing case on merits and allowing costs to defendant, Ent. & filed 2/27/50. (Notice to Counsel (Rule 77d) mailed 2/28/50.)

Mch. 15, 1950 Plaintiff's Notice of Appeal filed 3/14/50.

Mch. 15, 1950 Appeal Bond Executed in sum of $250.00, filed 3/14/50.

Mch. 15, 1950 Reporter's Transcript, filed 3/14/50.

Mch. 21, 1950 Appellant's designation of Record on Appeal, filed 3/21/50.

Mch. 24, 1950 Stipulation to include in appeal record praecipe filed behalf plaintiff 1/24/50 for attendance of Enroughty, et al., filed 3/24/50.

Mch. 24, 1950 Stipulation that appeal record shall show deposition of Wiles ~~was taken on~~ Sept. 2, 1949, filed 3/24/50.

[fols. 148-149] CLERK'S MEMORANDUM

Appeal Bond

(Filed March 14th, 1950)

Obligors:

Viola Hall Moore, Admr. of the est. of Louis Lee Moore, deceased, as Principal, and The Travelers Indemnity Company, as Surety.

Amount of Bond: $250.00.

Date of Bond: March 14th, 1950.

Conditioned to pay all costs.

[fol. 32] PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6092

VIOLA HALL MOORE, Administrator of the Estate of LOUIS LEE MOORE, JR., deceased, Appellant,

versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

March 29, 1950, the record on appeal is filed and the cause docketed.

March 30, 1950, the appearance of Walter Leake and Meade T. Spicer, Jr., is entered for the appellee.

April 3, 1950, the appearance of Geo. E. Allen and Geo. E. Allen, Jr., is entered for the appellant.

April 5, 1950, statement under section 3 of rule 10 is filed.

April 17, 1950, appendix to brief of appellant is filed.

May 22, 1950, brief of appellant is filed.

June 5, 1950, appendix to brief of appellee is filed.

June 7, 1950, the appearance of Strother Hynes is entered for the appellee.

June 7, 1950, brief of appellee is filed.

[fol. 33] ARGUMENT OF CAUSE.

June 20, 1950, (June term, 1950) cause came on to be heard before Parker and Dobie, Circuit Judges, and Moore, District Judge, and was argued by counsel and submitted.

[fol. 34] OPINION—Filed August 10, 1950

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6092

VIOLA HALL MOORE, Administrator of the Estate of LOUIS LEE MOORE, JR., deceased, Appellant,

versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

(Argued June 20, 1950. Decided August 10, 1950.)

Before Parker and Dobie, Circuit Judges, and Moore, District Judge

George E. Allen (Allen, Allen & Allen on brief) for Appellant, and Meade T. Spicer, Jr., and Walter Leake (Strother Hynes on brief) for Appellee.

[fol. 35] MOORE, District Judge:

Appellant brought this action under the Federal Employers' Liability Act, in the District Court for the Eastern District of Virginia, alleging that the death of her decedent, Louis A. Moore, Jr., was caused by negligence of appellee's agents and seeking to recover damages therefor. At the close of the evidence appellee moved the Court to direct a verdict in its favor. The Court reserved decision on the motion and submitted the case to the jury, which returned a verdict for appellant in the amount of $34,000.00. Upon motion then made by appellee the Court set aside the verdict and entered judgment for appellee. The case is here on appeal from the District Court's action.

Moore fell from the footboard of an engine tender while engaged in the performance of his duties as a brakeman for appellee in shifting operations on the Fulton Yards of appellee at Richmond, Virginia. The only eye witness to the accident was appellee's engineer, who was called as a wit-

ness for appellant. He testified that he was backing the engine and tender at the rate of about five miles per hour, pulling thirty-three cars. It was mid-afternoon and the weather was fair. Moore was standing on a footboard which was attached to the rear of the tender (being the front of the train while backing) at a height of about one foot above the top of the rail. He was facing forward, in the direction in which the train was moving. The outside end of the footboard on which Moore was standing was ten inches from the outside edge of the tender, and the distance from the footboard to the top of the tender was eight feet, seven inches. The engineer further testified that prior to the accident he [fol. 36] could see part of Moore's left shoulder and arm while the latter was standing at the end of the footboard with his back to the engineer. In answer to a question whether Moore was "standing up straight", he said that he was; and on further questioning said that "he was standing up like that and he started to slump"; that it seemed as if Moore's knees gave way and he pitched from the footboard in a kind of somersault, striking the ground on the back part of his shoulder. The engineer said that he then made an emergency application of the brakes, which, because the air had been disconnected from the cars, did not bring the train to an immediate stop; the tender, engine, one car and about half the second car passing the spot where Moore had fallen beside the track. Moore was dead when the engineer reached him, his body lying outside the track and at an angle to it. Later examination showed that his neck was broken, his lower left arm severed, several of his ribs fractured, and his lungs punctured.

No other affirmative evidence bearing on the facts immediately surrounding the accident was adduced.

Having elicited the foregoing testimony from the engineer, appellant's counsel attempted to show, both by questions to the engineer and by an expert witness, that, because of the height of the tender above the footboard and the distance from the end of the footboard to the edge of the tender, the engineer's view was obstructed and it would have been impossible for him to see Moore while the latter was "standing up straight" on the footboard. However it was shown by a photograph introduced in evidence that the left shoulder and arm of a man standing on the footboard in a position only slightly varying from the perpendicular and

supporting himself by the hand rail would have been clearly visible to the engineer.

[fol. 37] Appellee, with corroboration from appellant, who was examined as a witness in her own behalf, proved that Moore had suffered a coronary occlusion thirteen months before his death, which, in the opinion of the attending physician at the time of treatment, was thought likely to recur. The physician who examined the body at the undertaker's establishment certified that death was due to the injuries sustained in the fall. No autopsy was made to determine whether there were signs of a recurrence of the heart condition.

Appellant's argument is as follows: She has shown (she says) that the engineer made an emergency stop, that Moore fell from the footboard, sustaining injuries from which he died, and that it was impossible for the engineer to see Moore while the latter was "standing up straight" on the footboard of the tender, as the engineer testified he was standing. Therefore, her argument continues, since the engineer testified falsely that he saw Moore start to fall, the jury might reasonably infer that the engineer, for some reason unconnected with Moore's fall from the footboard, made a sudden stop without warning Moore, *causing* the latter to fall from the footboard to his death, and that the engineer, as appellee's agent, was guilty of actionable negligence.

We are not impressed with this argument. We hold that the District Court correctly sustained appellee's motion for a directed verdict. We find in the record no evidence sufficient to support an inference of any negligent act on the part of the engineer, or that his stopping the train caused Moore to fall. It is elementary that mere proof that an accident occurred affords no basis for an inference that it was caused by negligence. It was not enough for appellant simply to show that the engineer stopped the train suddenly. Hu-

[fol. 38] mane feelings required such action when the engineer saw, as he says he did, that Moore had fallen or was falling off the footboard. To warrant an inference of negligence, appellant must have proved that the emergency stop was begun *before* Moore fell. This she failed to do.

In none of the cases cited by appellant do we find support for her argument that the evidence in this case is sufficient to supply an inference of negligence. In *Tiller* v. *Atlantic*

Coast Line R. Co., 318 U. S. 54, a railroad employee, while standing between two tracks on a dark night inspecting the seals on the cars of a train moving slowly by him, was struck by the rear car of a train backing up on the adjoining track. It was held that there was a question of negligence for the jury. In *Tennant* v. *Peoria and P. U. Ry. Co.*, 321 U. S. 29, an engine crew were engaged in coupling cars situated intermittently along a track. Having completed the coupling operations, the engine remained stationary for five or ten minutes during which time the switchman disappeared around the rear of the engine going toward a point where his duties required him to be. He was never again seen alive. The engineer backed the engine up without ringing the bell, as, according to some of the conflicting evidence, he was required to do by a rule of the railroad company. Parts of the switchman's body were later found strewn along the track. The Court held that the question of proximate cause was one for the jury. In *Lavender* v. *Kurn*, 327 U. S. 645, a switch tender was struck on a dark night in the back of the head and killed. There were no eye witnesses, but the plaintiff claimed that deceased was struck by the tip of a mail hook hanging down on the outside of the mail car of a backing train. Due to the relative heights, the deceased could have been so struck only if he was standing near the track on a mound of cinders where his duties per-
[fol. 39] mitted him to be. The Court held that the question of negligence and proximate cause were properly submitted to the jury.

It will be noted that in each of these cases there was affirmative proof by circumstantial evidence from which the jury might reasonably infer negligence, and that such negligence was the proximate cause of the injury. No such evidence was offered in the instant case.

The fact that the witness whom appellant was compelled to call to prove her case was an employee of appellee did not relieve her from the burden of producing affirmative evidence from which an inference of negligence could be drawn. Appellant cites *Zumwalt* v. *Gardner*, 8th Cir., 160 F. (2d) 298, in which the plaintiff, a switchman, alleged that while he was attempting to get on the footboard of a Diesel engine he was suddenly thrown to the ground by a violent jerk caused by the negligence of the engineer in applying the brakes in emergency. The plaintiff called the engineer

as a witness and he denied having made the emergency stop. The Court held that the plaintiff was not necessarily bound by the testimony of the engineer who was a hostile witness. That case is clearly distinguishable from the one before us for decision. There the injured plaintiff himself testified that a sudden stop was made which threw him from the engine; whereas in the instant case there is no evidence of any kind to contradict the engineer in his statement that he stopped because he saw Moore fall. In *Eckenrode* v. *Penn. R. Co.*, 3rd Cir., 164 F. (2d) 996, aff'd 335 U. S. 329, where all the plaintiff's witnesses were employees of the defendant, the Court stated in a footnote that although the plaintiff was not bound by their testimony, yet, "belief that testimony is false will not support an affirmative finding [fol. 40] that the reverse of that testimony is true. Plaintiff has the burden of establishing his case by direct or circumstantial evidence; that burden is not met by pointing to the fact that all the available witnesses are hostile, and will not testify in a manner which would support the complaint."

We do not need to decide what might have been the result had appellant actually demonstrated that the engineer could not see Moore in the position the latter occupied on the footboard. We think the evidence, fairly interpreted, shows without contradiction that he *could* see him. Any straightforward witness, if asked whether the figure of a man shown in the photograph alluded to above was "standing up straight", would normally answer "yes", as did the engineer when asked by counsel for appellant if Moore was "standing up straight". It is worthy of note that these were the words of counsel, and not of the witness. They were carefully framed, for no other apparent purpose than to provide an excuse to contradict the engineer's testimony. We are asked to believe that the engineer meant that Moore's body was absolutely perpendicular to the footboard; that it formed a ninety degree angle with it; that a plumb line dropped from the center of his head would touch the footboard midway between his feet. Such verbal gymnastics are not favored in law. A witness' words will not be given a strained and forced interpretation when they admit of a natural, ordinary, colloquial construction. "Standing up straight" means not slumped forward or sidewise; not crouched down or stooping over; not bent in any direction. Wigmore on Evidence (3rd Ed.), Sec. 780; 58 Am. Juris. 317.

No fact was brought to light which could support an inference that the engineer stopped the train for any reason other than that which he gave in his testimony. The train was moving at a very slow rate of speed; the engineer was [fol. 41] alert; the day was fair; the track was clear; the switch was open. Under this evidence the jury's verdict for appellant could have resulted only from speculation and conjecture. Such a verdict cannot be allowed to stand. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333; *Chicago, M. and St. P. Ry.* v. *Coogan*, 271 U. S. 472. The District Court was clearly right in setting the verdict aside and entering judgment for appellee.

Affirmed.

[fol. 42] JUDGMENT—Filed and Entered August 10, 1950

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6092

VIOLA HALL MOORE, Administratrix of the Estate of LOUIS LEE MOORE, JR., deceased, Appellant,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Appellee

Appeal from the United States District Court for the Eastern District of Virginia

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Chief Judge, Fourth Circuit; Armistead M. Dobie, U. S. Circuit Judge; Ben Moore, U. S. District Judge.

August 18, 1950, petition of appellant for a stay of mandate is filed.

ORDER STAYING MANDATE—Filed August 22, 1950

(Style of Court and Title Omitted)

Upon the application of the appellant, by her counsel, and for good cause shown,

[fol. 43] It is ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

August 21, 1950.

John J. Parker, Chief Judge, Fourth Circuit.

STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. —

VIOLA HALL MOORE, Administrator of the Estate of LOUIS LEE MOORE, deceased, Petitioner,

versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Respondent

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. Appendix to brief of appellant in the United States Court of Appeals for the Fourth Circuit.
2. Appendix to brief of appellee in the United States Court of Appeals for the Fourth Circuit.
3. The proceedings had before the United States Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that petitioner will cause the Clerk of the United States Court of Appeals for [fol. 44] the Fourth Circuit to file with the Clerk of the Supreme Court the complete certified record on appeal in the Court of Appeals for the Fourth Circuit; and that, in the event that the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the complete record on appeal in that court as the parties may designate.

It is further stipulated and agreed that either of the parties hereto may refer in his brief to the record filed in the Supreme Court of the United States.

August 22, 1950.

Geo. E. Allen (Allen, Allen, Allen & Allen), Counsel for Petitioner; Meade T. Spicer, Jr., Walter Leake, Counsel for Respondent.

[fol. 45] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 164] SUPREME COURT OF THE UNITED STATES

No. 318, October Term, 1950

ORDER ALLOWING CERTIORARI—Filed November 6, 1950

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 165] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD— Filed November 18, 1950

It is stipulated and agreed by and between counsel for the respective parties hereto that the Clerk of the United Stats Supreme Court may omit from the printed record the plaintiff's requests to the court to charge the jury and the defendant's requests to charge the jury.

Witness our hands this 16th day of November, 1950.

Geo. E. Allen, Attorney for Plaintiff.

Meade T. Spicer, Jr., Attorney for Defendant.

[fol. 166] [File endorsement omitted.]

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Office-Supreme Court, U. S.
FILED
SEP 19 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATOR OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
A DOMESTIC CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

GEO. E. ALLEN,
(ALLEN, ALLEN, ALLEN, & ALLEN),
611 Mutual Building,
Richmond, Virginia,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATOR OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, A DOMESTIC CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Viola Hall Moore, Administrator of the Estate of Louis Lee Moore, Jr., respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on the 10th day of October, 1950.

A

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254. The decision of the United States Court of Appeals for the Fourth Circuit was rendered on August 10, 1950.

B

Summary Statement of Matter Involved

Petitioner's decedent lost his life in the performance of his duties as a brakeman of The Chesapeake & Ohio Railway Company while both he and the Company were engaged in interstate commerce. He left a widow and four small children ranging in ages from three to ten years. She qualified on his estate and sued the Company for damages under the Federal Employers' Liability Act. Upon the trial of the case in the District Court, the jury rendered a verdict for the plaintiff in the sum of $34,000.00. Upon motion of the defendant, the verdict was set aside upon the *sole* ground that it was contrary to the evidence, and final judgment was entered for the defendant. This judgment was affirmed by the Court of Appeals in an opinion rendered on the 10th day of August, 1950 (Appellee's appendix pp. 33-38).

C

Question Presented

The sole question presented is whether the courts below deprived petitioner of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, namely, a jury trial, by weighing the contradictory evidence, drawing inferences, judging the credi-

bility of witnesses, and drawing ultimate conclusions as to the facts, contrary to those drawn by the jury.

D

Reasons Relied On for Allowance of Writ

1. The United States Court of Appeals for the Fourth Circuit has rendered a decision in probable conflict with applicable decisions of the Supreme Court of the United States involving the right of petitioner to a jury trial under the Federal Employers' Liability Act.

A supporting brief accompanies this petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered by that Court in this case on the 10th day of August, 1950, and that the said judgment be reversed by this Honorable Court, and that the case be remanded to the District Court with directions that judgment be entered on the verdict of the jury with interest from the 31st day of January, 1950, the date of the rendition of the verdict (Va. Code 8-223).

GEO. E. ALLEN,
(ALLEN, ALLEN, ALLEN, & ALLEN),
611 Mutual Building,
Richmond, Virginia.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATOR OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, A DOMESTIC CORPORATION,

Defendant

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of the Courts Below

The opinion of the United States Court of Appeals for the Fourth Circuit (Appellee's appendix pp. 33-38) is reported in 183 F. 2d —.

The memorandum opinion of the District Court of the United States for the Eastern District of Virginia appears on pages 4 and 5 of the appendix to appellant's brief in the Court of Appeals.

II

Jurisdiction

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254. The judgment of the United States Court of Appeals for the Fourth Circuit to be reviewed was entered on August 10, 1950 (Appellee's appendix p. 38).

III

Statement of the Case

A statement of the case appears under heading "B" of the petition for the writ of certiorari. In the interest of brevity, this statement is not here repeated, but is referred to with the request that it be considered as incorporated herein by reference.

IV

Question Presented

The question specifically brought forward by the petition for a writ of certiorari appears under the heading "C" of the petition. Again, in the interest of brevity, it is not here repeated, but is referred to with the request that it be considered incorporated by reference.

V

Summary of Argument

The right to trial by jury is a basic and fundamental feature of our system of Federal jurisprudence. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as illusive here as in other fields. The jury has been chosen as the appropriate tribunal to apply those standards to the facts in personal injury cases. It is the

system which the Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away the goodly portion of the relief which Congress has afforded them. Only where there is a complete absence of probative facts to support the conclusion reached may the court take the case away from the jury. Such is not the case here, and the court erred in setting aside the verdict of the jury and entering final judgment for the defendant.

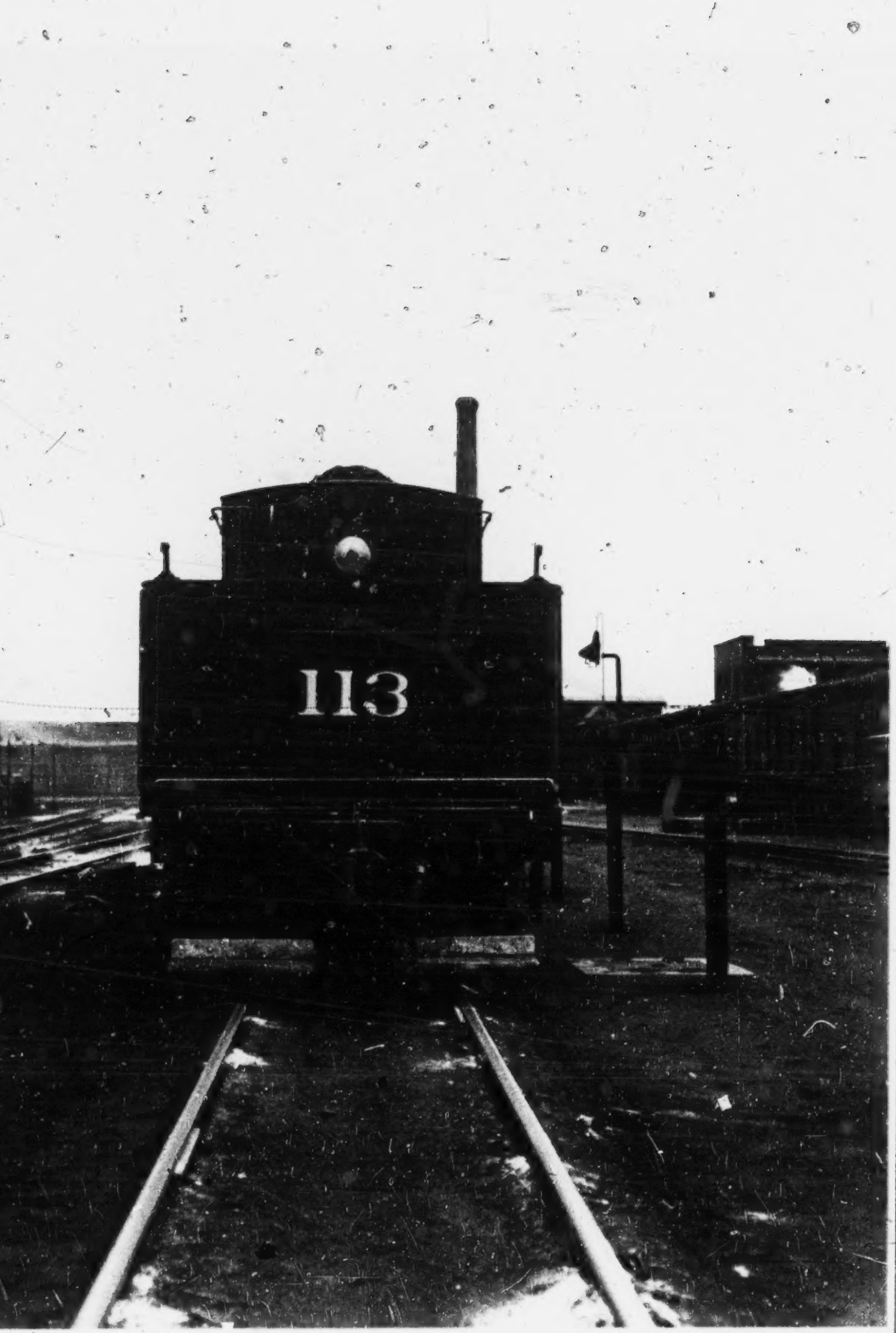
VI

Argument

The United States Court of Appeals, Fourth Circuit, recognized that proof by circumstantial evidence from which a jury might reasonably infer negligence and proximate cause is sufficient to support a verdict. But when the court undertook to apply this rule to the case in hand, it failed to give effect to the opinions of this Honorable Court on the subject of the right of railroad employees to a trial by jury under the Federal Employers' Liability Act. The Court, contrary to the purposes of the Act, proceeded to weigh contradictory evidence and inferences; to judge the credibility of witnesses and to draw conclusion from the facts proven contrary to those drawn by the jury. This will readily appear from a brief statement of the facts.

Plaintiff's decedent (whom we shall refer to as "Moore") lost his life on September 25, 1948, at about three p. m. while engaged as a brakeman in shifting operations on the Fulton Yards of defendant at Richmond. Moore was standing on the footboard behind the tender of Engine No. 114, where he was supposed to ride in the performance of his duties as brakeman (Appellant's appendix 19). For purposes of clarity, we reproduce here plaintiff's exhibit No. 1, page 138 of the complete record, showing the engine and tender of 113, which the testimony shows is identical with 114.

(Here follows 1 Photolithograph)


113

Facing the picture, Moore was riding on the footboard to the right with his back to the engine and tender. The engine was moving backward and Moore was facing in the direction in which the engine was moving. The edge of the footboard to Moore's left is exactly ten inches from the edge of the tender on that side (Appellant's appendix 38). He was standing behind the tender where he was supposed to stand in the performance of his duties (Appellant's appendix 19). He could not have stood closer to the edge of the tender on his left than 10 inches. The width of the tender is 10 feet, 1 inch; its height 9 feet, 7½ inches. The part of the tender which carries the coal projects still higher—3 feet and 11 inches at the side and 5½ feet higher at the center. The footboard on which Moore was standing was 1 foot and ½ of an inch above the top of the rail. From the top of the footboard to the top of the tender the distance was 8 feet and 7 inches (Appellant's appendix 37).

Wilds, the Engineer, was sitting on the engineer's seat box in the cab, with his back toward the direction in which he was moving, with his left hand on the throttle, his head turned to his right, looking back out of the window in the direction in which he was moving (Appellant's appendix 20-21). "I was looking out of the window", he said "and looking west to see if the switch were properly lined and there was anything on the leadback, as a usual thing, you know" (Appellant's appendix 31). He did not know whether he was going to take all of the thirty-three cars he was moving out through the switch at one time. "I don't know about that. I work by signals. I don't know whether they intended to put them all out and switch them or *stop* and cut part of them off" (Appellant's appendix 31) (Emphasis supplied).

The engineer didn't recall whether there was at the time a switch tender on duty at the point where the switch track

comes out into the ladder (Appellant's appendix 29). (A switch tender is one who is required to throw switches (Appellant's appendix 29, 30).) The engineer couldn't recall whether the brakeman, Cliff Stephens, who sometimes acted as switch tender, was on duty that day (Appellant's appendix 30), nor did the engineer recall whether anyone was around the switch at the time "looking after that switch, immediately before the accident"—the one he was coming out of (Appellant's appendix 30). Wilds said that Moore was not in position to give him any signal "if that switch was not in place" (Appellant's appendix 33), and that Moore was not giving any signal at the time of the accident (Appellant's appendix 21). He said Moore gave the back-up signal from the footboard at the beginning of the operation (Appellant's appendix 21). Such signals are given, he said, from the footboard where Moore was standing by reaching out from behind the tender (Appellant's appendix 23, 24). Wilds further said that if Moore had given a signal while standing up straight on the footboard behind the tender, without reaching out from behind the tender, the signal could not have been seen by him (Appellant's appendix 24); and he said that when he saw Moore just before the accident, "He was standing up straight on that footboard" (Appellant's appendix 25). He said Moore was *not* in a position to give him any signal "if that switch was not in place" (Appellant's appendix 33).

Carl Torrence, plaintiff's expert, made measurements and took sight lines from the engineer's seat box with his left hand on the throttle, looking out of the window to the rear from a point as far as he could get his head out—with his left hand on the throttle. He said that he could not see a person standing on the footboard as Wilds said Moore was standing immediately before the accident (Appellant's appendix 41). See Plaintiff's Exhibit No. 6, showing the

measurements and sight-lines from the engineer's seat box to the point where Moore was standing.

The jury was taken to the scene of the accident where they were shown the engine No. 114 and allowed to make their own observations, and tests (Appellant's appendix 45).

The Court of Appeals says in its opinion, which is found, pages 5 to 12 of the transcript, "We do not need to decide what might have been the result had appellant actually demonstrated that the engineer could not see Moore in the position the latter occupied on the footboard. We think the evidence, fairly interpreted, shows without contradiction, that he *could* see him."

In the first place, plaintiff's expert, Torrence, demonstrated mathematically by sight-lines, tests, and actual measurements, that the engineer could not see Moore. Torrence was asked if he made any tests for the purpose of determining whether the engineer could see Moore and he said he did. We quote from his testimony as follows:

> "Q. How far is the end of that footboard on which the deceased is said to have been standing to the outside of the tender?
>
> "A. The edge of the step is ten inches from the edge of the tender. * * *
>
> * * * * * * *
>
> "* * * if he (the engineer) had chosen to look out the side window you will see a dimension there nine inches plus or minus which is the most that he could have his eye projected beyond the side of the cab—his sight line from the side window would have been obstructed at the back corner of the tender which would have been that same ten inches from the edge of the step.
>
> * * * * * * *
>
> "Q. May I ask if you sat in the engineer's seat and tested the situation yourself?

"A. I did.

"Q. Tell us about your sight?

"A. From a point nine inches outside of the space of the cab, the sight line is obstructed at the back end of the tender and you would have no vision within that ten-inch space between the step and the edge of the tender. From the edge of the platform it would be obscured.

* * * * * * *

"* * * did you place anybody on the footboard?

"A. I did, sir.

"Q. In what position did you place him before you made your observation—standing upright?

"A. Standing upright, his foot on the edge of the step which was ten inches from the edge of the tender.

"Q. A man standing straight?

"A. Upright, straight. I could not see him when I put my head out of the side window.

"Q. Did you put your head out as far as you could see?

"A. As far as I could and still have my hand on the brake.

"Q. The throttle?

"A. The throttle, yes, sir" (Appellant's appendix pp. 37, 38, 39, 41, 42).

The engineer testified as follows:

"Q. When you first saw Mr. Moore back there was he standing up straight on that footboard?

"A. Yes, sir.

"Q. Did you see him do anything or make any motion or make any movement while he was still standing up straight?

"A. Yes, sir.

"Q. What did he do?

"A. He was standing up like that and he started to slump.

"Q. Straight down?

"A. As if his knees gave away like that, and straightened up.

"Q. When he slumped he was standing straight and then when he straightened up he was still straight behind the tender?

"A. Yes.

"Q. On that step?

"A. Yes.

"Q. You were at that time moving?

"A. I was.

"Q. West, as you said?

"A. Yes.

"Q. Then what did you do?

"A. I didn't do anything at that time.

"Q. You didn't do anything at that time.

"A. That is right.

"Q. What happened after that?

"A. You want me to tell about his falling off?

"Q. Yes.

"A. The next thing I notice, his body was hitting the ground and he come off the footboard in somersault position. He hit on the back part of his shoulder on the ground. His feet were laying in a westwardly position and kind of an angle to the track.

"Q. When he was in the somersault position was he behind the tender or outside?

"A. He had come a little bit to the outside, in other words, tumbling off.

"Q. How much of him was outside when you saw him in the somersault?

"A. I can't tell you how much of him. I saw his body when he hit the ground.

"Q. Was he clear of the engine when he turned the somersault, clear of the engine and tender?

"A. No, he wasn't clear.

"Q. Before he completed the somersault was he clear of it?

"A. I don't understand the question. Do you mean after he hit the ground was he clear of the engine, or what do you mean?

"Q. Let us illustrate it this way: Let us see, if you don't mind standing right here in front of Mr. Tilghman, and let us say this table is the outside of the engine and tender and the step is a little short of the engine and tender, the end of it. Do you know how many inches?

"A. No, I do not know exactly, but it is between four and six.

"Q. It lacks then from four to six inches, according to your recollection, of being out even with the outside of the engine and tender. Now then, you stand where you saw him when he slumped straight down and raised straight up and then turned a somersault and went on outside.

"A. With my back to him?

"Q. Whichever way the man was to you—Mr. Moore was to you.

"A. Standing in this position. He slumped like that as if his knees had given away. He righted himself and all in a second's time he come tumbling head foremost like this off of the engine and I seen his body when he hit the ground, on the back of his shoulder."

(Appellant's appendix pp. 25, 26, 27, 28, 29.)

The Court of Appeals comments on the testimony of the engineer as follows:

"Any straightforward witness, if asked whether the figure of a man shown in the photograph alluded to above 'was standing up straight,' would normally answer 'yes,' as did the engineer when asked by counsel for the appellant if Moore was 'standing up straight.' It is worthy of note that these words were the words of counsel and not of the witness."

The engineer was asked to stand in front of the jury behind a table; assume the table to be the tender of the engine and then illustrate before the jury the position of Moore when he saw him and just exactly how Moore slumped straight down and then raised himself straight up.

The witness then stood up straight and slumped straight down and raised himself up straight before the jury, just exactly as he said Moore had done.

If the words of the witness were the words of counsel and not of the witness, the actions of the witness before the jury when he slumped straight down and then raised himself straight up were not the actions of counsel. Counsel did not lay hands upon him and press him straight down. Nor did he catch hold of the witness and raise him straight up.

It is a part of the art of cross-examination for the cross-examiner to put words in the mouth of the witness, if he can do so. If the cross-examiner can get the witness to agree with him by the asking of leading questions, that is the cross-examiner's right. The case was tried before an able and experienced judge, with able and experienced trial counsel for the defense. If counsel for the plaintiff had exceeded the bounds of propriety, he would have been stopped.

The engineer had made statements upon a pre-trial examination. When called to the witness-stand, he endeavored to weaken the force of his previous statements. It was, therefore, the right of the cross-examiner to point out his former statements and seek to force the witness to admit, not only that he made the statements, but that they were true. Indeed, the proper way to examine a witness about his previous testimony is to call the previous testimony directly to the attention of the witness in the words in which it was given and ask him if he did not so testify. Unless such a foundation is laid, counsel will not be permitted to contradict a witness. If such a cross-examination amounts to "verbal gymnastics not favored in the law", then all good cross-examiners are guilty of "verbal gymnastics."

Wilds, the engineer, was the only eye witness to the accident known to the plaintiff. Consequently, she had no choice but to introduce him. He was therefore called by the plaintiff as an adverse witness and examined according to the rules applicable to the examination of such a witness. Virginia Code, Section 8-291. *Murphys Hotel* v. *Cuddy's Administrator*, 124 Va. 207, 97 S. E. 794. The mere fact that the engineer was called by the plaintiff did not bind the jury to accept *all* of his evidence. *Chicago, etc.* v. *Grauel*, 160 F. 2d 820. It was still in the province of the jury to pass upon the inconsistency or truthfulness of his statements and give or withhold its assent to the truthfulness of the particular statement as it saw fit. *Liberty Mutual Insurance Company* v. *Tiller*, 189 Va. 544, 53 S. E. 2d 814; *Atlantic Greyhound Corporation* v. *Shelton*, 184 Va. 684, 36 S. E. 2d 625; *Robert Jackson and others* v. *Victor Blue*, 153 F. 2d 67.

In the statement of the court to the effect that any straightforward witness, "if asked whether the figure of a man shown in the photograph alluded to above was standing up straight, would naturally answer, 'yes'," the court was referring to the photograph, defendant's exhibit B, p. 144 of the complete record. We here reproduce the photograph.

(Here follows 1 Photolithograph).

It plainly appears that the photograph was taken from an angle with the camera focused on the corner of the tender, the man standing with his left foot over the edge of the step, his right hand holding to a grab iron and his body leaning to his left, so that his shoulder appears to extend beyond the edge of the tender. The picture is so distorted that the footboard on which the man is standing appears to extend over the iron rail on that side only about half as far as the footboard appears to extend beyond the rail on the other side. The inside end of the footboard on which the man is standing appears to extend practically to the middle of the rails of the track, while the other footboard appears to be almost entirely on the outside of the rail, and yet, the court says any straightforward witness if asked whether the figure of a man shown in the photograph was "standing up straight," would normally answer "yes." We submit that no straightforward witness would say that the man shown in this photograph was "standing up straight." It is clear that he is leaning to the outside and holding on to the rail to keep from falling. His left foot is partly over the end of the footboard and his right foot is only a few inches from the edge. From this evidence the court says that the engineer could see Moore. *But* there is no evidence that Moore was standing in any such position. Moreover, the taking of the photograph from the angle from which it was taken, with the camera focused on the corner of the tender, makes it *appear* that the engineer could see more than he could in fact see.

A photograph taken in the ordinary way usually is an accurate record of the image cast by the lens upon the film, but as distortion is possible through the manner in which the camera or negative is used, before a photograph is admitted in evidence there should always be preliminary proof that it is a correct representation of the subject. No such

proof was offered in this case with reference to photograph designated as "Defendant's Exhibit B." The general rule is that after a photograph has been verified and admitted in evidence, the jury should determine what credit or weight should be given it as evidence. Photographic Evidence by Scott, page 496.

The rules for creating accurate photographs of accident scenes or objects are not complicated, but they are important. Different impressions may be created by merely turning the camera to the right or left in order to show a slightly different view. For instance, let us assume that an automobile collision occurs at a city intersection. One of the drivers, contending his view was obstructed in such a way that he could not see the other car approaching on the intersecting street, presents a photograph tending to support his theory. In this picture it appears that the view of the intersection would be obstructed by the building at the right. The camera was simply placed in such a position that the building on the extreme right appeared to obstruct the view. Another photograph made with the camera turned more to the right shows that because of its unique construction the building really does not create a blind intersection. See Photographic Evidence, Scott, pp. 61, 62, 63.

In the present case, defendant's photograph Exhibit B was created with the camera turned and placed so as to show that the engineer could see Moore, but the view represented by the photograph was not correct. The jury ignored it, and the appellate court had no right to regard it as controlling.

The court does not even mention the unimpeachable testimony of Torrence, illustrated by plaintiff's exhibit 6, showing the sight-lines and measurements by accurate mathematical calculations. This testimony demonstrates that the

engineer could *not* see Moore, if Moore was standing where the engineer said he was standing.

It was conceded that Moore lost his life while he and defendant were both engaged in interstate commerce. It is conceded that he was performing his duties as a brakeman, and that he was riding on the rear of the tender of the engine No. 114 in the performance of his duties. The engineer was backing in a westerly direction about five miles per hour, pulling thirty-three cars, intending to come out of track No. 12 into the ladder track, Moore having given the back-up signal by hand by reaching from behind the tender while standing on the footboard. He continued to ride there, which was where he was supposed to ride. He could not be seen while thus riding except when he was reaching out from behind the tender giving a signal. He had not given any signal since he gave the back-up signal at the beginning of the movement. He was not in a position to give any signal if the switch was not in place. The engineer was looking west to see "if the switch were properly lined and there was anything on the lead back". He didn't know whether they intended to take all of the thirty-three cars out through the switch at one time, or to *stop* and cut a part of them off, since he had received no signal. There was no switch tender on duty at the point where switch track No. 12 comes into the ladder track. There was no one near the switch track at the time "looking after the switch immediately before the accident".

The jury had a right to infer that the engineer, not seeing Moore on the footboard (since he was not reaching out giving any signal) and not seeing a switch tender or anyone else around the switch and not knowing whether they intended to take all of the thirty-three cars out of the switch at one time, or stop and cut some of them off, decided to make an emergency stop. He did in fact make such

a stop, without any notice whatsoever to Moore. The jury had a right to infer that the sudden, unexpected stop threw Moore forward from the footboard on the tender and that the engineer did not see him until his falling body had emerged from behind the tender and was "hitting the ground." "I saw his body when it hit the ground," the engineer said.

It is true the engineer said he saw Moore just before he fell and that he was standing up straight on the footboard behind the tender; that he started to slump straight down behind the tender as if his knees gave way; that he straightened up, still straight behind the tender and "the next thing he noticed his body was hitting the ground," "a little bit to the outside" of the engine, and that he "applied the brakes just as the body was hitting the ground." But the jury did not have to believe this part of the engineer's testimony, because it was in conflict with his several admissions that he could not see Moore while on the footboard unless he was reaching out from behind the tender giving a signal and that he had not given any signal since giving the back-up signal at the beginning of the operation. Such testimony was also in conflict with that of Torrence which was to the effect that it was physically impossible for the engineer to have seen Moore standing up straight on the footboard, as the engineer said he was standing. The jurors were allowed to view and inspect the engine and tender and make their own tests to determine whether the engineer could have seen Moore. Their verdict indicated the result of their own observations and tests.

The Court of Appeals said "there is no evidence of any kind to contradict the engineer in the statement that he stopped because he saw Moore fall." We respectfully submit that there is the evidence of Torrence and the map filed

by him showing sight observations and measurements to the effect that it was impossible for the engineer to have seen Moore. There was the evidence which the jurors themselves saw upon their own inspection and the results of their own tests and observations and there was the admission of the engineer that Moore was not in a position to give him any signal; that to give a signal he would have to reach out beyond the tender and he was not doing anything of the kind.

The Court of Appeals says that no fact was brought to light which could support an inference that the engineer stopped the train for any reason other than that which he gave in his testimony. We have pointed out the several conditions which obtained, namely, that the engineer was "looking west to see if the switch were properly lined and there was anything on the lead track as a usual thing, you know"; that he didn't know whether they intended to take all thirty-three cars "out and switch them or *stop* and cut part of them off," since he had received no signal; that he couldn't recall whether a switch tender was on duty at the point where the switch track No. 12 comes into the ladder track; that he couldn't recall whether anyone was near the switch at that time "looking after the switch immediately before the accident", and that he could not see Moore on the footboard, unless he was giving a signal. This combination of circumstances and conditions may have caused the engineer to stop unexpectedly. At any rate, if the jury believed that he testified falsely when he said he could see Moore standing up straight, then slump straight down, and raise straight up again, after which he tumbled off, the jury were forced to the conclusion that he suddenly stopped for some reason other than seeing Moore fall and that Moore fell as a result of the unexpected stop.

The inferences to be drawn from these circumstances were

strengthened by the failure of the defendant to call Holland, the conductor who was in charge of the shifting operation. Such failure gave rise to a presumption or inference that had he testified, his testimony would have been against the defendant. In *Puckett, et al.* v. *Draper,* 158 S. E. 68, 156 Va. 238, it is said:

> "'It seems plain to us that there is a stronger presumption to be raised against a party in whose possession the facts must be, if they exist, by which suspicion would be removed and all questions as to the propriety of his conduct be set at rest, who stolidly refuses, without the suggestion of a reason, to aid the court in arriving at the truth.'
>
> "In Wigmore on Evidence, vol. 1 § 285, it is said: 'The non-production of evidence that would naturally have been produced by an honest and, therefore, fearless, claimant, presents the inference that its tenor is unfavorable to the party's cause.' "

Holland was the conductor in charge of the train. The engineer was subject to his orders. If the conductor gave no order to stop the train, and the engineer made an emergency stop *without any orders,* should not the defendant have called the conductor to testify to that effect? Does not the defendant's failure to call him give rise to a presumption or inference that no emergency stop was made; that the stop was made upon the order of the conductor? And is not such a presumption or inference evidence upon which a jury may base a verdict? The decided cases answer the question in the affirmative.

In *Lavender* v. *Kurn,* 327 U. S. 645, 66 Sup. Ct. 740, the deceased was struck on a dark night in the back of the head and killed. There were no eye witnesses. Plaintiff claimed that the deceased was struck by the tip of a mail hook hanging down on the outside of the mail car of the backing train. This end was seventy-three inches above the top of the rail,

which was seven inches high. The end of the mail hook would sometimes swing out twelve to fourteen inches from the rail and seventy-three inches above the top of the rail. The deceased was only sixty-seven and one-half inches tall. Near the switch where the duties of the deceased required his presence was a mound of cinders and dirt rising at its highest points eighteen to twenty-four inches above the top of the rail. If the deceased had been standing on the mound about a foot from the side of the mail car, he could have been hit by the end of the mail hook. The defendant's theory was that the deceased was murdered. The jury found for the plaintiff in the sum of $30,000.00. Judgment was entered accordingly. On appeal the Supreme Court of Missouri reversed the judgment. Certiorari was granted by the Supreme Court of the United States and upon the hearing the Missouri Supreme Court was reversed. Mr. Justice Murphy, speaking for the Court, among other things, said:

> "The Supreme Court, in upsetting the jury's verdict against both the Frisco trustees and the Illinois Central, admitted that 'it could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches.' (189 S. W. 2d 255.) But it held that 'all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook' and that 'plaintiff failed to make a submissible case on that question.' It also ruled that there 'was no substantial evidence that the uneven ground and insufficient light were cause or contributing causes of the death of Haney.' "
>
> * * * * * * *
>
> "The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney

in the back of the head, and inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury.

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made the inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967; Bailey v. Central Vermont R. R. Co., 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts

> are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The following cases also support our contention: *Gray* v. *Southern Pacific Company*, 145 P. 2d 561; *Tennant* v. *Peoria etc. Ry. Co.*, 54 Sup. Ct. 409; *Kurimsky* v. *Unity Rys. Co.*, 55 A. 2d 378; *Stanford* v. *Penn. R. Co.*, 171 F. 2d 632.

In the *Gray* case, plaintiff's theory was that the deceased was knocked from the top of a box car while in the performance of his duties as a brakeman by the stopping of the train without warning. It was the defendant's claim that the stop was made to ascertain the whereabouts of the deceased when the engineer could not see him. In the *Kurimsky* case, a brakeman was killed during switching operations when he was jolted off one of the cars as a result of the engineer making a sudden stop of the train to throw a caboose, without advising the brakeman of the change of orders for a switching movement.

This Honorable Court, commencing with *Tiller* v. *Atlantic Coast Line Company*, 318 U. S. 54, in a succession of cases, has reversed almost every court which has held that a defendant was entitled to a directed verdict. In the *Tiller* case, this Court reversed the Court of Appeals for the Fourth Circuit, 128 F. 2d 420, which had affirmed the Dis-

trict Court in directing a verdict. The case, upon remand, was again tried in the Court below, where a directed verdict was denied. For this denial the Court of Appeals reversed and again this Court reversed the Court of Appeals, holding that the District Court properly submitted the case to the jury. In *Tennant* v. *Peoria etc. Ry. Co.*, 321 U. S. 29, the Court of Appeals for the Seventh Circuit reversed the District Court on account of its refusal to direct a verdict and the decision of that court, 134 F. 2d 860, was reversed by this Court. In *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, the Supreme Court of Vermont held that there should have been a directed verdict for the defendant, and this Court reversed the decision of that court. In *Blair* v. *Baltimore & Ohio R. R. Co.*, 321 U. S. 600, this Court reversed the Supreme Court of Pennsylvania, which had held that there should have been a directed verdict. In *Lavender* v. *Kurn*, 327 U. S. 645, 66 Sup. Ct. 740 (Mch. 25, 1946), this Court reversed the Supreme Court of Missouri which had held that there should have been a directed verdict for each of the defendants. In the recent case of *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 Sup. Ct. 413, decided January 31, 1949, the trial court directed a verdict for the defendant and the State Supreme Court affirmed. This Court reversed the State Supreme Court.

It will be thus seen that this Honorable Court treats the question of negligence and proximate cause as a jury question in this class of cases. Moreover, not only are these issues to be decided by a jury, but its decision is unassailable. In view of the decisions of this Honorable Court, it is in fact difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict. It seems that the Court of Appeals for the Fourth Circuit fails to appreciate the length to which this Honorable Court has gone in its decisions on this subject.

See *Fore* v. *S. Ry. Co.*, 178 F. 2d 349, where the Court again denied a railroad worker the right of a trial by jury:

See also in this connection "Recent Trends in Judicial Interpretations in Railroad Cases under the Federal Employers' Liability Act," by Moore, 29 Marquette L. Rev. 73.

It is respectfully submitted that both the District Court and the Court of Appeals erred in setting aside the verdict of the jury and entering final judgment for the defendant.

VII

Conclusion

In conclusion, counsel for petitioner, respectfully submits that for the reasons herein set forth, a writ of certiorari should be granted the petitioner and that this Court should review and reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATOR OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED,

Petitioner,

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
A DOMESTIC CORPORATION

Defendant

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF THE PETITIONER

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BRIEF ON BEHALF OF THE PETITIONER

I

Opinions of the Courts Below

For opinion of the United States Court of Appeals, for the Fourth Circuit (R. 86), see 184 F. 2d 176.

For memorandum opinion of the District Court of the United States, for the Eastern District of Virginia, see Record 69.

II

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254. The judgment of the United States Court of Appeals, for the Fourth Circuit, to be reviewed, was entered on August 10, 1950 (R. 91).

III

Statement of the Case

Plaintiff's decedent lost his life in the performance of his duties as a brakeman of The Chesapeake & Ohio Railway Company, while both he and the Company were engaged in interstate commerce. He left a widow and four small children, ranging in ages from 3 to 10 years. She qualified on his estate, and sued the Company for damages under the Federal Employers' Liability Act (45 U. S. C. A., Section 51, et seq.) in the District Court, for the Eastern District of Virginia. She alleged, and evidence adduced on her behalf tended to show, that while the decedent was standing on the footboard of an engine tender, engaged in the performance of his duties as a brakeman in shifting operations, the engineer made a sudden stop, without notice or warning to decedent, which caused the decedent to fall from the footboard in the direction in which the engine was moving, after which the engine ran over and killed him. The defendant alleged, and evidence adduced on its behalf tended to show, that the decedent had commenced to fall before the engineer attempted to stop, and that he applied the brakes and stopped *because* he saw the decedent falling. The issue thus raised was submitted to the jury by the following language of the Court's charge:

> "If you believe from the evidence that plaintiff's decedent, Mr. Moore, was at the post of duty standing

on the footboard of the tender from which he fell and that he had not commenced to fall until the engineer applied the brakes and shut the throttle off and brought the engine to a sudden and unusual stop and that such action was without notice to Mr. Moore, then it was a negligent action which caused Mr. Moore to fall down and you should find for the plaintiff.

"On the other hand, if you find, as I said a moment ago that Mr. Moore fell either through fault of his own or due to his physical condition or for any other reason not attributable to negligence on the part of the railroad company, then your verdict, of course, should be for the defendant (R. 64).

"* * * The issue which you have before you is very narrow. It boils down to this: If you believe from the evidence that Mr. Moore was thrown from the fender as a result of the sudden stop or violent jerk which resulted from the unexpected application of brakes, then you may conclude that the defendant railroad company is liable for negligence. On the other hand, that is the only charge of negligence contained in the complaint. Unless you believe that your verdict should be for the defendant" (R. 65).

At the close of all the evidence, defendant made a motion for a directed verdict in its favor, upon the ground that the evidence was insufficient to support a verdict for the plaintiff. The Court declined to grant the motion, submitted the case to a jury, subject to a final determination of the question raised, upon the return of the verdict (R. 59-60). The jury returned a verdict for the plaintiff in the sum of $34,000.00. Upon motion of the defendant, the verdict was set aside and final judgment entered for the defendant pursuant to Rule 50 of the Federal Rules of Civil Procedure (R. 71). This judgment was affirmed by the Court of Appeals in an opinion rendered on the 10th day of August, 1950 (R. 86).

The key witness upon which the whole case turns was the

engineer, who was in charge of the engine at the time plaintiff's decedent was killed. His testimony was in part favorable to the plaintiff, and in part favorable to the defendant. The jury discarded that which was unfavorable to the plaintiff and accepted that, along with other testimony, which was favorable to her. The testimony which was unfavorable to the plaintiff and favorable to the defendant was that the engineer could see Moore in the position the latter occupied on the footboard, and that he saw Moore commence to fall before the brakes were applied. Testimony adduced on behalf of the plaintiff and admissions made by the engineer tended to show that it was physically impossible for the engineer to have seen Moore in the position he occupied on the footboard. The Court of Appeals said, "We think the evidence, fairly interpreted, shows without contradiction that he (the engineer) *could* see him (Moore)" (Emphasis supplied). We respectfully submit that the Court exceeded its powers, and usurped the function of the Jury in undertaking to "fairly interpret the evidence."

IV

Question Presented

The question, therefore, specifically brought forward is whether the courts below, by setting aside the verdict of the jury and entering final judgment for the defendant, deprived the plaintiff of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, when to do so, the Court had to weigh contradictory evidence, draw inferences, judge the credibility of witnesses, and draw ultimate conclusions as to the facts, contrary to those drawn by the jury.

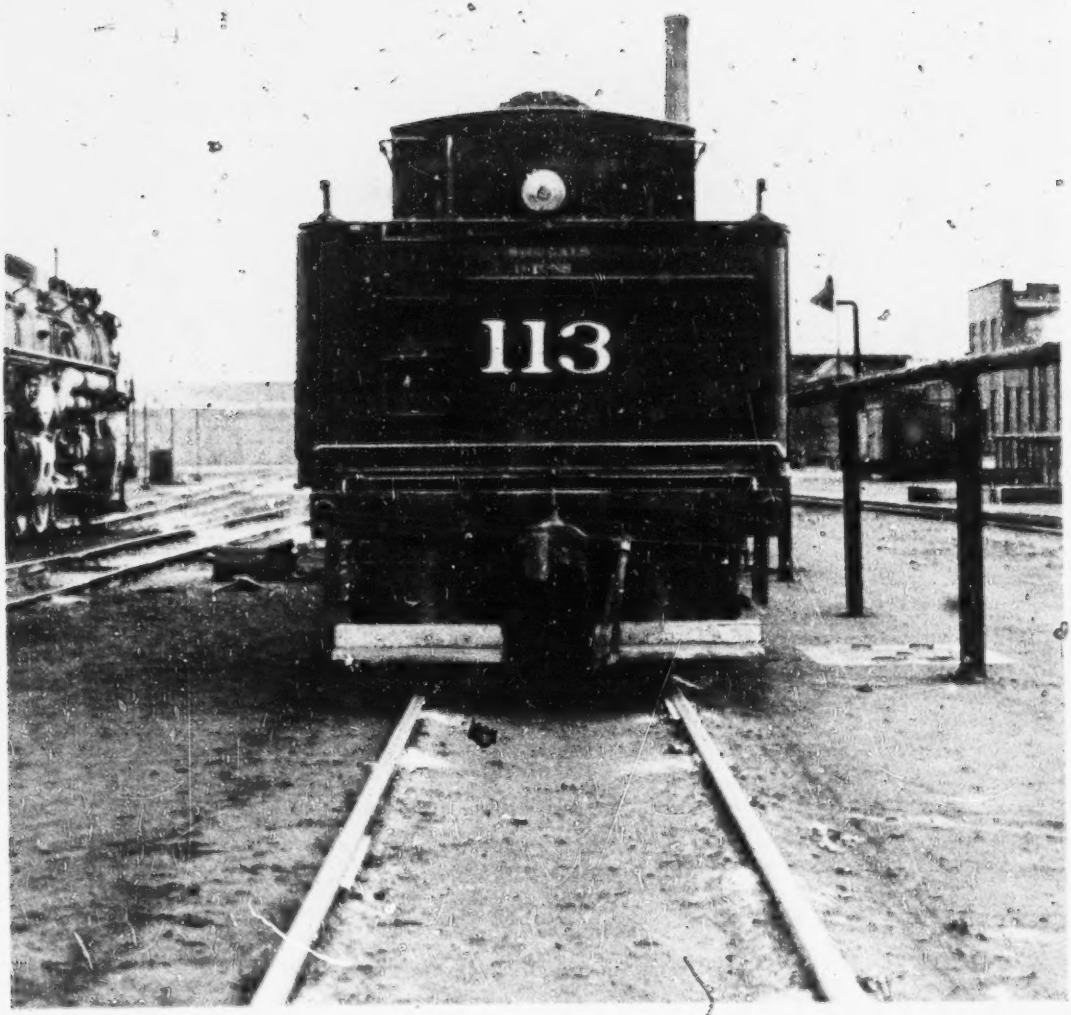
V

Argument

Our argument will be based upon facts stated pursuant to the familiar rule that the evidence tending to support the verdict must be considered and analyzed in a light favorable to the plaintiff.

Plaintiff's decedent (whom we shall refer to as "Moore") lost his life on September 25, 1948, at about three p. m. while engaged as a brakeman in shifting operations on the Fulton Yards of Defendant at Richmond (R. 19). Moore was standing on the footboard behind the tender of Engine No. 114, where he was supposed to ride in the performance of his duties as brakeman (R. 21). For purposes of clarity, we reproduce here plaintiff's exhibit No. 1, (R. 75), showing the engine and tender of 113, which the testimony shows is identical with 114 (R. 21).

(Here follows 1 Photolithograph)


113

Facing the picture, Moore was riding on the footboard to the right with his back to the engine and tender. The engine was moving backward and Moore was facing in the direction in which the engine was moving. The edge of the footboard to Moore's left is exactly ten inches from the edge of the tender on that side (R. 43). He was standing behind the tender where he was supposed to stand in the performance of his duties (R. 21). He could not have stood closer to the edge of the tender on his left than 10 inches. The width of the tender is 10 feet, 1 inch (R. 42); its height 9 feet, 7½ inches (R. 42). The part of the tender which carries the coal projects still higher—3 feet and 11 inches at the side and 5½ feet higher at the center (R. 43). The footboard on which Moore was standing was 1 foot and ½ of an inch above the top of the rail (R. 42). From the top of the footboard to the top of the tender the distance was 8 feet and 7 inches (R. 43).

The engine was moving backward pulling 33 cars (R. 30) about 5 miles an hour (R. 19). While Moore was standing on the footboard of the tender, in the line of duty, the engineer applied the brakes and made a sudden stop, without any notice or warning to Moore (R. 24). When the engine and train came to a stop, it had run over and killed Moore. "An engine length, a car length and a small part of the second car in front of the engine," had passed Moore's dead body (R. 23).

Wilds, the engineer, was sitting on the engineer's seat box in the cab, with his back toward the direction in which the engine was backing, with his left hand on the throttle, his head turned to his right looking back out of the window in the direction in which the engine was moving (R. 20). "I was looking out of the window", he said, "and looking west to see if the switch were properly lined and there was

anything on the leadback, as a usual thing, you know" (R. 30).

Wilds said he saw Moore standing up straight on the footboard before the accident, and while thus standing, he started to slump straight down "as if his knees gave way like that, and straightened up" (illustrating) (R. 26). We quote:

> "Q. When he slumped he was standing straight and then when he straightened up he was still straight behind the tender?
> "A. Yes.
> "Q. On that step?
> "A. Yes.
> "Q. You were at that time moving?
> "A. I was.
> "Q. West as you said?
> "A. Yes.
> "Q. Then what did you do?
> "A. I didn't do anything at that time.
> "Q. You didn't do anything at that time.
> "A. That is right.
> "Q. What happened after that?
> "A. You want me to tell about his falling off?
> "Q. Yes.
> "A. The next thing I notice, his body was hitting the ground * * *" (R. 26)

Carl Torrence, plaintiff's expert, made measurements and took sight lines from the engineer's seat box with his left hand on the throttle, looking out of the window to the rear from a point as far as he could get his head out—with his left hand on the throttle. He said that he could not see a person standing on the footboard as Wilds said Moore was standing immediately before the accident (R. 46). See plaintiff's exhibit No. 6 (R. 80), showing the measurements and sight lines from the engineer's seat box to the point where Moore was standing (admitted R. 48). Torrence

was asked if he made any tests for the purpose of determining whether the engineer could see Moore and he said he did. We quote from his testimony as follows:

> "Q. May I ask if you sat in the engineer's seat and tested the situation yourself?
>
> "A. I did.
>
> "Q. Tell us about your sight?
>
> "A. From a point nine inches outside of the space of the cab, the sight line is obstructed at the back end of the tender and you would have no vision within that ten-inch space between the step and the edge of the tender. From the edge of the platform it would be obscured (R. 45).
>
> * * * * * * *
>
> "* * * did you place anybody on the footboard?
>
> "A. I did, sir.
>
> "Q. In what position did you place him before you made your observation—standing upright?
>
> "A. Standing upright, his foot on the edge of the step which was ten inches from the edge of the tender.
>
> "Q. A man standing straight?
>
> "A. Upright, straight. I could not see him when I put my head out of the side window.
>
> "Q. Did you put your head out as far as you could see?
>
> "A. As far as I could and still have my hand on the brake.
>
> "Q. The throttle?
>
> "A. The throttle, yes, sir" (R. 46-47).

Torrence further testified that if it were possible for a man to stick his head out further, for every foot further that he could get his head out, he would gain about a sixteenth of an inch more within the ten inches between the end of the step and the edge of the tender (R. 50).

The statement of Wilds that he could see Moore on the footboard, in the position described by him, is not only

contradicted by the physical facts—it is contradicted by Wilds himself. He admitted:

(1) That Moore was not in position to give him any signal, immediately before the accident (R. 37).

(2) That Moore was not giving any signal at the time of the accident (R. 22).

(3) That signals are given from the footboard where Moore was standing by reaching out from behind the tender (R. 24, 25).

(4) That if one should give a signal while standing up straight on the footboard behind the tender without reaching out from behind the tender, the signal could not be seen by the engineer. "Without his hand going out like that, you can't see the signal" (R. 25).

(5) That, notwithstanding he saw Moore standing up straight, slump straight down, and straighten himself up again behind the tender, he did nothing; the next thing he noticed being his body hitting the ground (R. 26).

(6) That he stopped the engine and train of 33 cars, moving at five miles an hour, within the length of the engine, a car length, and a small part of the length of the second car in front of the engine (R. 23, 29), without *air pressure* on the cars behind him, and that it would take longer to stop with "so much weight behind you," and without air pressure (R. 32).

(7) In addition to the statements set out above, Wilds, at the request of counsel, stood up straight before the jury behind a table, the edge of the table representing the edge of the tender on Moore's left, and demonstrated Moore's standing position, how he slumped straight down and then raised himself straight up and thereafter tumbled off of the engine (R. 27).

The jury was taken to the scene of the accident where the jurors were shown the engine No. 114 and allowed to make their own observations, and tests (R. 50, 51).

It will be observed that the plaintiff had no choice but to call Wilds, since he was the only eye witness known to her. Certain facts, other than the cause of Moore's fall, necessary to a recovery, could be established only by him. He was not only in the employ of the defendant, but was in the immediate control of the engine at the time of the accident. Plaintiff undertook to call him as an adverse witness, subject to examination, in accordance to the rule laid down in *Murphy's Hotel* v. *Cuddy's Administrator*, 124 Va. 207, 97 S. E. 794. The Court ruled that it did not necessarily follow, from the facts stated, that Wilds would be adverse; that if he proved to be adverse, then he might be examined according to the rules applicable to an adverse witness. Counsel for plaintiff stated that the reading of a pre-trial examination of Wilds would itself prove him to be adverse (R. 18). However, Wilds was not at first examined as an adverse witness. The examination proceeded for some ten or twelve pages, until Wilds hesitated to answer some of the questions as he had answered them on his pre-trial examination. His attention was then called to his previous testimony. Gradually, from that point on, counsel proceeded to examine Wilds as an adverse witness, without the slightest objection on the part of counsel for the defendant. It was during the course of the cross-examination that he gave the answers to the "standing up straight questions".

The Court of Appeals commenting on the testimony of the engineer, given under the circumstances related, said:

> "Any straightforward witness, if asked whether the figure of a man shown in the photograph alluded to above 'was standing up straight,' would normally answer 'yes,' as did the engineer when asked by counsel for the appellant if Moore was 'standing up straight.'

It is worthy of note that these words were the words of counsel and not of the witness" (R. 90).

The record shows that the engineer was asked to stand in front of the jury behind a table; assume the table to be the tender of the engine and then illustrate before the jury the position of Moore when he saw him and just exactly how Moore slumped straight down and then raised himself straight up. The witness then stood up straight and slumped straight down and raised himself up straight before the jury, just exactly as he said Moore had done.

If the words of the witness were the words of counsel and not of the witness, the actions of the witness before the jury when he slumped straight down and then raised himself straight up were not the actions of counsel. There is no evidence that counsel laid hands upon him and pressed him straight down, or that he caught hold of the witness and raised him straight up.

It is a part of the art of cross-examination for the cross-examiner to put words in the mouth of the witness, if he can do so. If the cross-examiner can get the witness to agree with him by the asking of leading questions, that is the cross-examiner's right. The case was tried before an able and experienced judge, with able and experienced trial counsel for the defense. There was no objection from the Court or counsel to the method of cross-examination.

The engineer had made statements upon a pre-trial examination. When called to the witness-stand, he endeavored to weaken the force of his previous statements. It was, therefore, the right of the cross-examiner to point out his former statements and seek to force the witness to admit, not only that he made the statements, but that they were true. Indeed, the proper way to examine a witness about his previous testimony is to call the previous testimony directly to the attention of the witness in the

words in which it was given and ask him if he did not so testify. Unless such a foundation is laid, counsel will not be permitted to contradict a witness. If such a cross-examination amounts to "verbal gymnastics not favored in the law", as said by the Court of Appeals, then all good cross-examiners are guilty of "verbal gymnastics."

In the statement of the court to the effect that any straightforward witness, "if asked whether the figure of a man shown in the photograph alluded to above was standing up straight, would naturally answer, 'yes', the court was referring to the photograph, defendant's exhibit B (R. 82). We here reproduce the photograph.

It plainly appears that this photograph was taken from an angle with the camera focused on the corner of the tender, the man standing with his left foot partly off of the edge of the step, his right hand holding to a grab iron and his body leaning to his left, so that his shoulder *appears* to extend beyond the edge of the tender. The picture is so distorted that the footboard on which the man is standing appears to extend over the iron rail on that side only about half as far as the footboard appears to extend beyond the rail on the other side. The inside end of the footboard on which the man is standing appears to extend practically to the middle of the rails of the track, while the other footboard appears to be almost entirely on the outside of the rail. Facing the picture, the rear light on the tender appears to be located halfway between the left and the center of the upper part of the tender, whereas, in fact, it is actually located in the center. Yet, the court says, looking at the man standing on the tender, "Any straightforward witness, if asked whether the figure of a man shown in the photograph alluded to above 'was standing up straight,' would normally answer 'yes.' as did the engineer when asked by counsel for the appellant if Moore was 'standing up straight.'"

We submit that no straightforward witness would say that the man shown in this photograph was "standing up straight." It is clear that he is leaning to the outside and holding on to the rail to keep from falling. His left foot is partly over the end of the footboard and his right foot is only a few inches from the edge. From this evidence the court says that the engineer could see Moore. *But* according to evidence of the engineer which we have quoted, and which the Jury accepted, Moore was not standing in any such position. Moreover, the taking of the photograph from the angle from which it was taken, with the camera

focused on the corner of the tender, makes it *appear* that the engineer could see more than he could in fact see.

A photograph taken in the ordinary way usually is an accurate record of the image cast by the lens upon the film, but as distortion is possible through the manner in which the camera or negative is used, before a photograph is admitted in evidence there should always be preliminary proof that it is a correct representation of the subject. No such proof was offered in this case with reference to photograph designated as "Defendant's Exhibit B." The general rule is that after a photograph has been verified and admitted in evidence, the jury should determine what credit or weight should be given it as evidence. Photographic Evidence by Scott, page 496.

The rules for creating accurate photographs of accident scenes or objects are not complicated, but they are important. Different impressions may be created by merely turning the camera to the right or left in order to show a slightly different view. For instance, let us assume that an automobile collision occurs at a city intersection. One of the drivers, contending his view was obstructed in such a way that he could not see the other car approaching on the intersecting street, presents a photograph tending to support his theory. In this picture it appears that the view of the intersection would be obstructed by the building at the right. The camera was simply placed in such a position that the building on the extreme right appeared to obstruct the view. Another photograph made with the camera turned more to the right shows that because of its unique construction the building really does not create a blind intersection. See illustration Photographic Evidence, Scott, pp. 61, 62, 63.

In the present case, defendant's photograph Exhibit B was created with the camera turned and placed so as to

show that the engineer could see Moore, but the view represented by the photograph was not correct. The jury ignored it, and the appellate court had no right to regard it as controlling.

The court declined to say what would have been the result had appellant demonstrated, in the opinion of the court, that the engineer could not see Moore on the footboard, saying:

> "We do not need to decide what might have been the result had appellant actually demonstrated that the engineer could not see Moore in the position the latter occupied on the footboard. We think the evidence, fairly interpreted, shows without contradiction that he *could* see him. Any straightforward witness, if asked whether the figure of a man shown in the photograph alluded to above was 'standing up straight', would normally answer 'yes', as did the engineer when asked by counsel for appellant if Moore was 'standing up straight'" (R. 90).

In this connection, it is worthy of note that the engineer, Wilds, was sitting on the engineers' seat box in the cab with his left hand on the throttle, looking back out of the window in the direction in which he was moving—that is west (R. 30). "I was looking out of the window," he said, "and looking west to see if the switch were properly lined and there was anything on the leadback as a usual thing, you know" (R. 30). He said he didn't know whether he was going to take all of the thirty-three cars out through the switch at one time. "I don't know about that. I work by signals. I don't know whether they intended to put them all out and switch them or *stop* and cut part of them off" (R. 30) (Emphasis added). He said he didn't recall whether there was at the time a switch tender on duty at the point where the switch track comes out into the ladder track (R. 29). (A switch tender is one who is required to

throw switches.) (R. 29). He said he couldn't recall whether the brakeman, 'Cliff Stephens,' who sometimes acts as switch tender, was on duty that day (R. 29), nor could he recall whether anyone was around the switch at the time, "looking after that switch, immediately before the accident"—the one he was coming out of (R. 30).

The jury had a right to infer that the engineer, not seeing Moore on the footboard (since he was not reaching out giving any signal) and not seeing a switch tender or anyone else around the switch and not knowing whether they intended to take all of the thirty-three cars out of the switch at one time, or stop and cut some of them off, decided to make an emergency stop. He did in fact make such a stop, without any notice whatsoever to Moore. The jury had a right to infer that the sudden, unexpected stop threw Moore forward from the footboard on the tender and that the engineer did not see him until his falling body emerged from behind the tender and was "hitting the ground." "I saw his body when it hit the ground," the engineer said.

It is true the engineer said he saw Moore just before he fell and that he was standing up straight on the footboard behind the tender; that he started to slump straight down behind the tender as if his knees gave way; that he straightened up, still straight behind the tender and "the next thing he noticed his body was hitting the ground," "a little bit to the outside" of the engine, and that he "applied the brakes just as the body was hitting the ground." But the jury did not have to believe this part of the engineer's testimony, because it was in conflict with his several admissions that he could not see Moore while on the footboard unless he was reaching out from behind the tender giving a signal and that he had not given any signal since giving the back-up signal at the beginning of the operation, and

that he was not in a position to give a sigral. Such testimony was also in conflict with that of Torrence which was to the effect that it was physically impossible for the engineer to have seen Moore standing up straight on the footboard, as the engineer said he was standing. Such testimony is also in conflict with the inference that if the engineer had seen Moore standing up straight behind the tender, slump straight down, and then raise himself up, he would have applied the brakes at that time, instead of waiting until Moore was hitting the ground. He said he did nothing until Moore's body was practically hitting the ground. The jury did not believe this statement. In addition to all of the foregoing, the jurors were allowed to view and inspect the engine and tender and make their own observations and tests in order that they might properly weigh and evaluate the testimony in determining whether the engineer could see Moore standing on the footboard behind the tender. Their verdict indicates the result.

The inference to be drawn from these circumstances was strengthened by the failure of the defendant to call Holland, the conductor who was in charge of the work. (R. 31). Such failure gave rise to a presumption or inference that had he testified, his testimony would have been against the defendant. In *Puckett, et al*, vs. *Draper*, 158 S.E. 68, 156 Va. 238, it is said:

> "'It seems plain to us that there is a stronger presumption to be raised against a party in whose possession the facts must be, if they exist, by which suspicion would be removed and all questions as to the propriety of his conduct be set at rest, who stolidly refuses, without the suggestion of a reason, to aid the court in arriving at the truth.'
>
> "In Wigmore on Evidence, vol. 1 § 285, it is said: 'The non-production of evidence that would naturally

> have been produced by an honest and, therefore, fearless, claimant, presents the inference that its tenor is unfavorable to the party's cause.' "

In *Woods* v. *Graf*, 84 Fed. Supp. 893, the Court said that conduct which forms a basis for an inference is evidence; that silence is often evidence of the most persuasive character; citing *Belokamsky* v. *Todd*, 44 SCR 94, 263 U.S. 149; *Runkle* v. *Burnham*, 14 SCR 837, 153 U.S. 216; *Kirby* v. *Talmadge*, 16 SCR 349, 16 U.S. 179. All evidence, the Court said, is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted. Citing *Cooper* v. *Dasher*, 290 U.S. 106, 109, 54 Sup. Ct. Rep. 6, 7, citing *Kirby* v. *Talmadge*, 160 U.S. 379, 383, 16 SCR 349.

In the case of *Johnson* v. *United States*, 333 U.S. 46, 68 Sup. Ct. 391, two fellow workers were the only available witnesses, the plaintiff and his co-worker. The plaintiff testified in his own behalf. Neither party, for reasons of its own, called plaintiff's co-worker. Mr. Justice Frankfurter, in the course of a dissenting opinion, said, in part:

> "A trial is not a game of blind man's bluff * * * Federal Judges are not referees at prize fights but functionaries of justice. * * * A Federal Judge * * * has the power to call and examine witnesses to elicit the truth. * * * Instead of entering judgment for the party who had the burden of proof and did not meet it, the Trial Judge should at least have called Dudder (co-worker) as the court's witness. * * * If neither party will risk calling a witness who knows important facts, it is in the power of the court to call and examine such a witness, in the interest of truth and justice, allowing both parties the right of cross-examination and impeachment."

The plaintiff thought she had made out a case for the jury without calling the conductor. The Judge evidently

thought so, because he submitted the narrow issue squarely to the jury. If the Judge changed his mind after the jury had drawn the inference of negligence, the common law required him to award a new trial in setting aside the verdict of the jury so that the plaintiff might call Holland or introduce expert testimony that the engineer could not possibly have stopped the train as quickly as he did (pulling 33 cars without air pressure), unless he had applied the brakes before he saw Moore's body emerging from the side of the tender hitting the ground. Such a course would have been "according to the rules of the common law," as the Constitution provides.

It is true the plaintiff summoned the conductor. But why should plaintiff call the defendant's employee who was in charge of the work, unless compelled to do so? The plaintiff had already produced evidence from which the jury could infer that Moore was thrown from the engine by the sudden stop without notice and run over and killed.

In *Gray* v. *Southern Pacific Company*, 145 P. 2d 561, plaintiff's theory was that the deceased was knocked from the top of a box car while in the performance of his duties as a brakeman by the negligent stopping of the train without warning.

After the train in question had stopped for water, it proceeded forty or fifty car lengths and attained a speed of about eight miles an hour, and was then brought to a stop by the engineer by the application of air throughout the train. The train traveled about five car lengths from the time the air brakes were applied before it stopped. Following the stop, deceased was found dead, his head and left forearm having been severed from the body. His body was found at about the fortieth car from the head of the train; his forearm was found leaning against the inside of the south rail of the tracks under the thirty-fifth car.

There thus were five cars between his body and arm or the same distance that the train traveled from the time of the application of the brakes to the stop.

From the other circumstantial facts, it was deduced that the deceased was at the thirty-fifth car from the head of the train at the time of the occurrence of the event that caused his death. There was evidence that the custom or practice was for the head brakeman, under the circumstances presented, to inspect the first half, or the first thirty-four to thirty-five cars of the train from the ground as it rolled out of the station, giving special attention to whether the brakes were sticking on the wheels of any of the cars, or whether any wheels were sliding. After the portion of the train subject to his inspection had rolled past, he would board the train, going on top of the cars to give or receive signals.

The law of the case was stated as follows:

> "It is wholly reasonable to conclude that on the occasion in question the decedent was performing those duties, had inspected his portion of the train and boarded the thirty-fifth car. That conclusion is consistent with evidence which is susceptible of the interpretation that the maximum speed of eight miles per hour for a train pulling out of a station is designed to enable trainmen who are making a rolling inspection from the ground to board the train after completion of that duty. Also, the evidence shows that deceased was characterized as an excellent brakeman, always willing to do his part and was active and competent, hence, likely to be performing his duties. The foregoing circumstances are sufficient to place decedent on the thirty-fifth car, and sustain the inference that he fell from that car. With reference to the presence of deceased on the train, without regard to the particular portion thereof, defendant admits in its answer that at the time of the accident deceased was on the top of one of the freight cars of the train in the course of his

employment and that he was run over by the train. Thus, if the defendant was negligent in stopping the train and that negligence was the proximate cause of his death, there is sufficient evidence to support the verdict. The foregoing circumstances clearly furnish a basis for concluding that the stopping of the train was the cause of the accident, particularly the location of the body and the location and position of the forearm. They reasonably establish as a fact that the accident occurred while the train was in the process of stopping."

The Court, with reference to evidence supporting defendant's contentions that deceased fell before the stop while crossing without a lantern from one car to another enroute to the engine, said:

"The most that can be said of such evidence is that it created a conflict in the evidence or involved the credibility of the witnesses or the weight of the evidence, all matters which were resolved against defendant by the jury and with which we are not concerned on appeal. In addition to the circumstances heretofore related as supporting the jury's verdict, there are other circumstances which mitigate against defendant's version of the accident. Although it was a dark night, the weather was warm and dry and as far as appears the cars were in good condition. Deceased was a brakeman of many years' experience, was an alert, agile and able workman, and the tracks traversed were in good condition and decedent was familiar with them and the character of the train involved. All of those circumstances carry inferences which rebutt the assumption that deceased fell when going from the top of one car to another without the intervention of any unusual occurrence."

As to the credibility of the witnesses, the Court said:

"In determining the disputed question of fact presented at the trial of the case it was the province of the

jury to disbelieve any testimony which appeared to them to lack verity. They were the exclusive judges of the credibility of the witnesses and the weight to be given the testimony. They could reject positive testimony and accept circumstantial evidence as proof of the facts, as it is elementary that direct evidence may be disbelieved and contrary circumstantial evidence relied upon to support a verdict of finding. *Barkham* v. *Widing*, 210 Cal. 206, 291 P. 173; *Parsons* v. *Easton*, 184 Cal. 764, 195 P. 419.

"The foregoing discussion has to do with the manner, and place in which the deceased met his death. There is evidence from which an inference may be drawn that he was on the 35th car, and that he fell therefrom some time between the application of the brakes and the stop, and that there was a definite link of causation between the stop and the fall. It remains then to determine whether or not defendant was negligent in making the stop, and hence liable. There is considerable discussion in regard to whether the stop was unusual. It is defendant's claim that the stop was made to ascertain the whereabouts of the deceased. There is evidence that such a stop was not a common occurrence and certainly it was not to be expected at least as far as the deceased was concerned. There is nothing to indicate that he was aware that a stop was going to be made. The stop was not for any emergency. * * * In view of the custom and practice requiring the deceased to make a rolling inspection of the train and board about the 35th car, the engineer in the lead engine should have known that the deceased in the course of his duty was on the top of the train at the time it was stopped. Those circumstances also negative the reason advanced by the engineer for the stop, that is, that it was due to the absence of deceased from the cab of the lead engine. While there is evidence by several witnesses that the stop was gradual and easy and without a jerk in the cars there are circumstances from which the jury could have inferred that the stop would probably have caused some jolting. Before the stop practically all of the slack between the

cars had been taken up. Although there is evidence that the proper application of the air brakes throughout the train results in a uniform braking to avoid jerking, the element of the slack resulting from stopping is an element to be considered. An application of air at a slow speed creates a greater shock than at high speed."

To support its conclusions, the Court quoted at length from *Tenauf* v. *Peoria etc. Ry. Co.*, 64 Sup. Ct. 409.

In *Kurimsky* v. *Unity Rys. Co.*, 55 A. 2d 378, a brakeman was killed during switching operations when he was jolted off one of the cars as a result of engineer making sudden stop of the train to throw a caboose, without advising the brakeman of the change of orders for a switching movement.

> "The Court submitted to the jury whether 'there was a sudden jerk or jolt or jar of this train which threw Kurimsky from the train and to the tracks, in such manner as to cause his death?' The Judge also said, 'If there was no sudden or unusual jerk or jolt of any kind, then of course there is no negligence in this case and the plaintiff's case fails.'"

There was a verdict for the plaintiff, and the question on appeal was whether the evidence was sufficient to authorize the jury finding that the negligence of the railroad company was the proximate cause of the brakeman's death under the Federal Employers' Liability Act? The facts in the case appear from the following statements taken from the opinion of the Court:

> "The body of Stephen Kurimsky, who had been working as an extra brakeman in a crew engaged in switching empty coal cars, was found under the locomotive about 6:30 P.M., November 30, 1944. His administratrix sued under the Federal Employers' Liability Act, and alleged that his death resulted in negligence in changing orders during a shift operation without notice to him. She recovered a verdict. Defendant now complains that judgment N.O.V. was refused.

"There were five men in the crew in charge of a caboose, a locomotive and tender. The conductor ordered a shift of seven empty coal cars from track 2 to track 1, parallel tracks extending north and south. Witnesses said it was dark, very windy, slippery, and snowing. With the caboose attached to the front, or north, end of the locomotive, they moved south on track 2, automatically coupled the tender to the seven cars and pulled them northward, crossing switch 2 on defendant's road and cross-over switch connecting the B. and L. E. Railroad to a point where the train stopped preparatory to pushing the cars southward onto track 1, where they were to be left. To facilitate that move, Kurimsky threw switch 2 to allow the train to pass to track 1, and then gave a lantern signal to proceed. The signal was relayed forward to the locomotive engineer, some three hundred feet way, who then started his train southward to cross over to and leave the cars on track 1. Kurimsky was last seen alive standing at or about switch 2. There is evidence from which the jury could find that it was his duty to board the train as it passed him at that point on his way southward and, when they reached the point where the cars were to be left, to set the brakes on the lead car to keep them in place on track 1 and then to come forward and uncouple the cars from the tender and engine. * * *

"After Kurimsky gave the lantern signal that the switch was set for the shift to track 1, and after that movement began, the conductor-by-signal to the engineer, ordered the caboose, which was in the front of the locomotive to be uncoupled. To comply with that order, the engineer had to reduce his speed and come to a stop or near stop to allow a trainman to uncouple the caboose. There is evidence that from a speed of ten miles per hour the train came to a stop in a few seconds. This sudden stop, which interrupted the movement to track 1, plaintiff contended caused Kurimsky to fall to the track from the car, on which it was his duty to ride. * * *

"The engineer testified that the order to throw off the caboose was a sudden order. He was asked, Q. Not being aware that the order was going to be given, the suddenness of that order would have something to do with the suddenness with which you reduced your speed? A. That is right. Q. And that, in turn, would affect the amount of jerk on the cars? Isn't that right? A. Possibly would, yes. He said to detach the caboose was a matter of a few seconds."

The Court stated the law of the case as follows:

"In the absence of evidence to the contrary, it is presumed that he did his duty and got on the train as it passed. Compare Tennant v. Peoria etc. Ry. Co., 321 U. S. 29, 34, 64 S. Ct. 409, 88 L. Ed. 520. When, after the train stopped on track 1, Kurimsky did not appear to uncouple the cars from the tender, a search was made for him and he was found under the engine.

"Appellant contends that the distances traveled by the train during the described movements demonstrate that the change in the order required to detach the caboose could not have resulted in Kurimsky's falling through or between cars to the track at or near the points where he and his lantern were found. The witnesses, whose statements were not consistent with each other, did not testify concerning locations and distances with mathematical exactitude; it was, however the duty of the jury to find the facts from their evidence. The jury could find that Kurimsky was on the train for the purpose of performing his duty; that he was not advised of the change of orders for the switching movement; that the sudden stopping, in the circumstances, may have jolted him off the train, whereas, if he had known of the change of orders, he might have been prepared for and have avoided the danger. The evidence brought the case within the statute. Compare Tennant v. Peoria, etc. Ry. Co. 321 U. S. 29, 64, S. Ct. 409, 88 L. Ed. 520; Lavender v. Kurn. 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; De Lellis v. Pittsburgh & L. E. R. Co., 350 Pa. 436, 39 A. 2d 588, which considered the

failure to warn of an unusual switchover of an eastbound train to a westbound track."

In the *Gray* case, the defendant was operating a freight train consisting of two engines, sixty-two cars and a caboose. At the time of the accident the train was moving at eight miles an hour. The train traveled 250 feet from the time the air brakes were applied before it stopped. In this case if the engineer applied his brakes *after* Moore started to fall, the train was stopped within the length of the engine, one car length and a half of another car length, thirty-six to forty feet being a car length (R. 23, 29). That appears to be an unusually short distance within which to stop thirty-three cars moving at a speed of five miles an hour without air pressure. The engineer was asked to state the distance in which he could ordinarily stop, while traveling five miles an hour, by an emergency application of the brakes, and he refused to give an opinion on the subject (R. 23, 24). He was an experienced engineer and there is only one reason why he should not have answered the question, and that is, his answer would have stated a distance greater than an engine length, a car length and a half of a car length, and would have thus shown that he applied the brakes before Moore started to fall.

The cases involving the question whether a sudden stop or jerk constitutes negligence are collected in Note 89, page 75, and Note 29, page 154 of Volume 10A, Federal Code Annotated. Many of the cases cited were decided before the doctrine of assumption of risk was completely abolished by the 1939 Amendment to the Federal Employers' Liability Act. Under the Act, as amended, no element of assumption of risk could possibly be involved.

The facts proven in the instant case as a basis for the inference of negligence and proximate cause were stronger than the facts proven in the case of *Lavender* v. *Kuhn*, 327

U. S. 645, 66 S. Ct. 740, which were held to be sufficient by this court. In that case the deceased was struck on a dark night in the back of the head and killed. There were no eye witnesses. Plaintiff claimed that the deceased was struck by the tip of a mail hook hanging down on the outside of the mail car of the backing train. This end was seventy-three inches above the top of the rail, which was seven inches high. The end of the mail hook would sometimes swing out twelve to fourteen inches from the rail and seventy-three inches above the top of the rail. The deceased was only sixty-seven and one-half inches tall. Near the switch where the duties of the deceased required his presence was a mound of cinders and dirt rising at its highest points eighteen to twenty-four inches above the top of the rail. If the deceased had been standing on the mound about a foot from the side of the mail car, he could have been hit by the end of the mail hook. The defendant's theory was that the deceased was murdered. The jury found for the plaintiff in the sum of $30,000.00. Judgment was entered accordingly. On appeal the Supreme Court of Missouri reversed the judgment. Certiorari was granted by the Supreme Court of the United States and upon the hearing the Missouri Supreme Court was reversed. Mr. Justice Murphy, speaking for the Court, among other things said:

> "The Supreme Court, in upsetting the jury's verdict against both the Frisco trustees and the Illinois Central, admitted that 'It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches.' (189 S. W. 2d 255.) But it held that 'all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook,' and that 'plaintiff failed to make a submissible case on that question.' It also ruled that there 'was no sub-

stantial evidence that the uneven ground and insufficient light were cause or contributing causes of the death of Haney.' "

"The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney in the back of the head, and inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury.

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967; Bailey v. Central Vermont R. R. Co., 319 U. S. 350, 353, 354 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Tennant v.

Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520. See also, Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate courts function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

No phase of negligence law offers greater resistance to logical treatment than the much discussed question of proximate cause, as was so well said by Circuit Judge Evans in *Eglsaer* v. *Scandrett* (7th Cir.), 151 F. 2d 562. Judge Evans then quotes from *Tennant* v. *Peoria, etc. Co.*, 321 U. S. 29, 64 S. Ct. 409, as follows:

"'The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. * * *

"'Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner

> of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case.' "

After thus quoting from the *Tennant* case, Judge Evans continues, in part:

> "Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,'— if the injury or death resulted '*in part*' from defendants' negligence, there is liability."

In the *Eglsaer* case, the evidence was that the engineer had climbed on to the cat walk of the engine to repair a defective bell ringer; that he had fallen to the ground; that the cat walk was slippery and dirty; and that a loose rope was lying adjacent to the bell ringer; and the court held the evidence sufficient from which the jury could draw the inferences supporting the finding that the defective bell ringer was at least in part the cause of the engineer's death, and that the jury's finding that the defective bell ringer was the proximate cause of the engineer's death was not objectionable as to allowing speculation to do duty for probative facts. See Vol. 4, NACCA Law Journal, pages 203, 204, 205.

As a whole, the right of trial by jury seems now to be crystalizing into a legal necessity enjoying the sanction of this Honorable Court "unless there be manifestly a woeful lack of evidence which could leave a jury nothing but speculation." 3 NACCA Law Journal 196. The historic role of the jury in performing that function is being restored in this important class of cases. Id. p. 197.

"For the outstanding studies on the jealously guarded right of trial by jury in these cases as opposed to the

instructed verdict against the employee, the following cases make exceptionally good literature in illustrating that trial by jury is not a privilege of the employee but is a *constitutionally guaranteed demand*. Trust Co. v. Erie R. R., 165 F. 2d 806; Galloway v. U. S., 319 U. S. 372, 397, 398, 399; Tarter v. U. S., 17 F. Sup. 691, 692, 693; Owens v. Union Pacific R. R. Co., 319 U. S. 715, 724; Bailey v. Central Vermont Ry., Inc., 319 U. S. 350, 353; Tiller v. A. C. L. Ry. Co. 318 U. S. 54; Blair v. B. & O. Co., 323 U. S. 600, 602; Lavender v. Kurn, 327 U. S. 645, 652, 653; and lastly, of course, Wilkerson v. McCarthy, 336 U. S. 53, a decision which should be honored from now on in deciding issues similarly involved in future cases" (Italics supplied). 3 NACCA Law Journal, p. 198.

The "constitutionally guaranteed demand" referred to is, of course, the seventh amendment, which provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

This section is a prohibition to the courts of the United States to reexamine any facts tried by a jury in any manner other than according to the rules of the common law. The only modes known to the common law to reexamine such facts are the granting of a new trial by the court where the issue was tried or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.

In *Solem* v. *New York Life Insurance Co.*, 228 U. S. 364, 33 Sup. Ct. 523, this Court, in an able and exhaustive opinion, after reviewing the authorities at length, said:

"'The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . . One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the 7th Amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guaranty of the rights and liberties of the people.' And then coming to the clause, and 'no fact tried by a jury shall be otherwise re-examined in any court of the United States,' than according to the rules of the common law,' he continued (pp. 447, 448): 'This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings.'

"In Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, decided in 1897, where the Amendment was again under consideration, it was said by this court, speaking through Mr. Justice Brewer: 'Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative . . . Now a general verdict embodies both the law and the facts. The jury taking the law as given by the court, apply that law to the facts as they find them to be, and express their conclusions in the verdict. The power of the court to grant a new trial if, in its judgment, the jury have misinter-

preted the instructions as to the rules of law, or misapplied them, is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact.'

"In Capital Traction Co. v. Hof, 174 U. S. 1, 13, 43 L. ed. 873, 877, 19 Sup. Ct. Rep. 580, decided in 1899, the subject was much considered, and, following a careful review of the prior decisions, it was said by Mr. Justice Gray, who spoke for the court: 'It must therefore be taken as established, by virtue of the 7th Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds $20, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a state, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States.'"

Referring to taking a case from the jury by demurrer to the evidence, the Court said:

"(b) Such a demurrer is permissible only when proposed by one party, joined in by the other, and allowed by the court. It must contain an express and distinct admission by the demurrant of every fact which the evidence of his adversary conduces to prove, else he cannot insist that the latter join in the demurrer; and the admission, to be effective to that end, must be of

the facts, and not merely the evidence from which their existence is inferable. (c) When the matter of fact is so ascertained and shown in the demurrer, the case is deemed ripe for judgment in matter of law, and the jury properly may be discharged from giving a verdict."

Without regard to whether Rule 50 of the Federal Rules of Civil Procedure accomplishes indirectly that which cannot be done directly, it is certain that the rule was never intended to grant to the courts the power of weighing the contradictory evidence, drawing inferences, judging the credibility of witnesses, and drawing ultimate conclusions as to the facts, contrary to those drawn by the jury. Such an interpretation of the rule would bring it in conflict with the constitutional provision.

Conclusion

Moore lost his life while he and the defendant were both engaged in interstate commerce. He was riding on the footboard of the tender on the rear of engine No. 114 in the performance of his duties. The footboard was behind the tender 10 inches from the edge on the engineer's side. The engineer was backing in a westerly direction, about five miles per hour, pulling thirty-three cars, without air pressure, intending to come out of track No. 12 into the ladder track. Moore had given the back-up signal for this movement by reaching from behind the tender while standing on the footboard. While Moore was thus riding, the engineer applied his brakes and stopped the train suddenly without warning to Moore. When the train came to a stop, Moore was found lying on the ground, having been run over by the engine. "An engine length, a car length, and a small part of the second car in front of the engine" had passed Moore's dead body. These facts are not contradicted. The doctor stated that Moore died from the injuries sustained in the accident.

While the engineer testified that he saw Moore standing up straight on the footboard before he started to fall, the physical facts showed that he could not have seen Moore while he was thus standing there. Several admissions made by Wilds on cross-examination were to the effect that he could not have seen Moore standing on the footboard. The jury, therefore, disregarded the engineer's testimony to the effect that he saw Moore on the footboard before he commenced to fall and thereafter applied the brakes. With this testimony of the engineer out of the case, there was left the admitted fact that the engineer applied the brakes suddenly, without warning to Moore, for some *other* reason, and that when the train came to a stop, Moore was found mortally injured about where he

would have been expected to fall from a sudden stop, without warning.

It is true that Moore had suffered a heart attack thirteen months before the accident, but he recovered promptly and was permitted by the defendant company to go back to work. He had suffered no recurrence of the injury. In the accident his neck was broken, his left arm severed, several of his ribs fractured and his lungs punctured (R. 11). The physician who examined the body certified that death was due to the injuries sustained in the fall (R. 12).

The questions of negligence and proximate cause were, therefore, jury questions. To deprive the plaintiff of the benefits of the verdict of the jury was to deny her a right guaranteed to her under the Seventh Amendment to the Constitution.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATOR OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED,
Petitioner

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A DOMESTIC CORPORATION,
Respondent

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fourth Circuit

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY IN OPPOSITION

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On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fourth Circuit

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY IN OPPOSITION

I

OPINIONS OF THE COURTS BELOW

(1) The opinion of the United States Court of Appeals for the Fourth Circuit is contained in Appellee's Appendix, pages 33-38, not yet officially reported, but when so reported will appear in 183 F. 2nd.

(2) The memorandum opinion of the District Court of the United States for the Eastern District of Virginia appears on pages 4 and 5 of the Appendix to Appellant's brief in the Court of Appeals.

II

RULES AS TO WRITS OF CERTIORARI APPLICABLE.

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 10, 1950 (Appellee's Appendix 38). The petition for writ of certiorari was filed September 19, 1950, and notice thereof served on the appellee on September 22, 1950; the jurisdiction of this Court being invoked under Title 28, U.S.C., Section 1254(1), subject to rules regulating the granting or refusing of writs of certiorari.

III

SOLE QUESTION PRESENTED BY THE PETITION

The "sole question" presented, according to the Petition, is whether "the Courts below" (i.e, the District Court of the United States for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit) *"deprived petitioner of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, namely, a jury trial,* by weighing the contradictory evidence, drawing inferences, judging the credibility of witnesses, and drawing ultimate conclusions as to the facts, contrary to those drawn by the jury." (Italics supplied.) See heading "C", p. 2 of the Petition.

Under heading "D" of the Petition, p. 3, giving the "Reasons Relied On For Allowance Of The Writ", the fact is emphasized that the right of "a jury trial" (as distinguished from a trial by the Court and jury) is the only question presented by the petition. We quote from the petition:

> "The United States Court of Appeals for the Fourth Circuit has rendered a decision in probable conflict with applicable decisions of the Supreme Court of the United States *involving the right of petitioner to a jury trial under the Federal Employers' Liability Act*". (Italics supplied.)

So that the "sole question" presented in this petition for a writ of certiorari, is whether the plaintiff is entitled to a jury trial under the Federal Employers' Liability Act, notwithstanding it may appear from the evidence as a matter of law, that any verdict rendered thereon for the plaintiff would be or is (as held in the present case by the two courts in question) not only contrary to the law and evidence, but without evidence whatsoever, direct or circumstantial, to support it.

Not unless "the applicable decisions of the Supreme Court of the United States" support any such ground as that above *specified*, is a certiorari available. Rule 38, paragraph 2 of the Supreme Court provides as follows:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

It will be noted that after *specifically* bringing forward the "right of the petitioner to a jury trial under the Federal Employers' Liability Act", as being the "sole question" presented, the petition goes on to state how the petitioner

was "deprived" of the right by the "courts below", to-wit, "by weighing the contradictory evidence, drawing inferences, judging the credibility of witnesses and drawing ultimate conclusions as to the facts contrary to those drawn by the jury".

(1) If there could be language more abstract, more general and less specific than that last above-quoted from the petition, it is difficult to conceive what the language could be. In fact, it is respectfully submitted that the language is merely a "rhapsody of words" made over a "body of contraction"—that body of contraction being the alleged right of trial by a jury alone and not by court and jury as in all other negligence cases.

(2) Apart from the generality of the foregoing language, this unwarranted broadside against the trial court and the Court of Appeals of the Fourth Circuit, is annexed as a relative clause, argumentative in character, relating only to the alleged means by which "the courts below deprived petitioner of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, namely, a jury trial." (Petition p. 2.)

(3) The general words contained in the foregoing quotation from the petition were taken largely from language used *arguendo* in *Lavender* v. *Kurn*, 327 U. S. 651, 652-653, and have no relevancy to the present case. The present case turns on the testimony of a single witness on a single, simple question of undisputed fact, and that witness being the plaintiff's (Petitioner's) own witness, all of which will be more fully shown below.

Thus, it appears that the only question "*specifically* brought forward by the *petition* for writ of certiorari" (Rule 38, par. 2, cited *supra*) is the alleged right of a "jury trial", without the intervention of the court, in any

and all actions brought for damages by a railroad worker under the Federal Employers' Liability Act.

Unless therefore a trial court is *absolutely* deprived of the right in such cases to direct a verdict, where the verdict is not only contrary to the law and evidence but without any evidence whatever to support it, then no certiorari should be granted in this case.

However, the right of a trial court to direct a verdict in a proper case in this class of cases, is not only settled by many recent decisions rendered by this Court; but this fact is conceded in the "Summary of Argument", contained on page 7 of the brief in support of the petition, where this is said:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away the goodly portion of the relief which Congress has afforded them. Only where there is a complete absence of probative facts to support the conclusion reached may the court take the case away from the jury."

1. In the first place, it will be noted that the exception contained in the brief accompanying the petition, is not contained in the "Sole question presented" in the petition; and that Rule 38, paragraph 2, above cited, provides that only the questions specifically brought forward by the *petition* for writ of certiorari will be considered.

Obviously, it would be requiring an improper and onerous burden, and one incapable of accurate determination, to impose upon the court the duty to search the briefs to determine what was the specific question intended to be presented by the petition. *Southern Power Co.* v. *North Carolina Public Serv. Co.*, 263 U. S. 508, 44 S. Ct. 164, 68 L. ed. 413. This, no doubt, is the reason for the establishment of the rule above cited.

2. In the second place, despite the assertion in the petitioner's brief to the contrary, the present case comes within the very exception mentioned in the brief, where the court may take the case away from the jury, namely, "where there is a complete absence of probative facts to support the conclusion reached." That there was a complete absence of any evidence to support the plaintiff's case, was upon mature deliberation definitely adjudicated by the District Court, and on appeal therefrom to the Court of Appeals for the Fourth Circuit, this judgment of the District Court was affirmed as being "clearly right". Moreover, such a conclusion will, we submit, be convincingly established by an examination of the record.

In fact, the brief accompanying the petition itself indicates a consciousness of the justice inherent in the decisions of the two courts below and the unassailable character of their conclusions. Otherwise, there would be no occasion (1) for the misstatements, as well as inaccuracies of fact contained in the petitioner's brief, as will be hereinafter shown; and (2) for contending at the conclusion of the brief (p. 26)—contrary to the above-mentioned concession in the "Summary of Argument"—that "negligence and proximate cause" are in this class of cases treated as questions for the jury; that on these issues "its decision is unassailable", and that it would be "difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict."

IV

SUMMARY STATEMENT OF MATTER INVOLVED INSUFFICIENT

Rule 38, par. 2, provides that—besides "the questions presented" and "the reasons relied on for the allowance of the

writ"—"the petition shall contain a summary and short statement of the matter involved." And adds thereto the following provision:

> "A failure to comply with these requirements will be a sufficient reason for denying the petition."

The "summary statement of the matter involved", is under heading "B" p. 2 of the petition. It states that plaintiff's decedent lost his life in the performance of his duties as a brakeman of The Chesapeake and Ohio Railway Company, while both he and the Company were engaged in interstate commerce; that he left a widow and four small children ranging in ages from three to ten years; that she qualified on his estate and sued the Company for damages under the Federal Employers' Liability Act; that upon the trial of the case in the District Court, the jury rendered a verdict for the plaintiff in the sum of $34,000.00; that upon motion of the defendant the verdict was set aside upon the *sole* ground that it was contrary to the evidence; that final judgment was entered for the defendant; and that this judgment was affirmed by the Court of Appeals in an opinion rendered on the 10th day of August, 1950 (Appellee's Appx. 33-38).

This statement of the "Matter Involved" is (1) not only manifestly insufficient to show what is the matter involved, but (2) is inaccurate and erroneous in its statement as to what happened upon the trial of the case.

(1)

The Singleness and Simplicity of the Matter Involved Obscured by the Summary Statement in the Petition

The statement as to the matter involved significantly omits any reference to the pleadings; and that the complaint alleged

only one specific ground of negligence, namely, that the plaintiff's decedent, while acting as brakeman for the defendant in a yard switching movement and located "in a position of safety on the rear of the tender" of a locomotive, was caused to be thrown to the ground by the sudden application of the brakes in emergency, in a "hitherto unprecedented and unexpected change in the manner of shifting cars", and without proper warning or signal to the decedent, who was thereby fatally injured (Appellant's Appx. 2-3).

An additional general allegation of negligence "in other respects and particulars", was stricken by the Court from the Complaint, on defendant's motion, after plaintiff had failed to furnish a more definite statement of such negligence (Appellee's Appx. 28-29). There was no allegation of any negligence with respect to the footboards on the locomotive tender, or as to the brakes, or any other appliances or appurtenances connected with the locomotive or group of cars attached to it. And no violation of any safety appliance acts is in any way involved in this case.

Defendant's answer denied any negligence on its part; denied that the decedent was thrown off the tender by any application of the engine brakes; denied there was any change made in the manner of shifting cars, or that any sudden stop was made while decedent was on the tender. It averred that the decedent, as an experienced brakeman, had full knowledge of the engine movements being made and the physical situation, and further averred that his injuries were solely due to an accident which could not have been reasonably foreseen or anticipated by the defendant, etc. (Appellee's Appx. 1-3).

That the sole question on which the case was submitted by the Court to the jury (under Rule 50 of the Federal Rules of Civil Procedure), was the single specific issue indicated

above, is shown by the concluding portion of the trial court's charge, to which there was no objection or exception by either party, where the Court said (Appellant's Appx. 12-13):

> "The issue which you have before you is very narrow. It boils down to this: If you believe from the evidence that Mr. Moore was thrown from the tender as the result of the sudden stop or violent jerk which resulted from the unexpected application of brakes, then you may conclude that the defendant railroad Company is liable for negligence. On the other hand that is the only charge of negligence contained in the Complaint. Unless you believe that, your verdict should be for the defendant."

Only one person testified as to how the decedent was injured and the circumstances surrounding it, and so far as known, he was the only eye-witness of the accident. This was the locomotive engineer (Wilds). He was put on the stand by and testified as a witness for the *plaintiff* (appellant), and not even as an adverse witness, as is stated in the petition. (See Appellee's Appx. 4.)

Wilds' testimony was unequivocally and emphatically, not only to the effect that *the brakes did not go on the locomotive and train until after the plaintiff's decedent fell, but that he personally saw the plaintiff's decedent fall, and applied the brakes himself subsequent to, and solely because of, the decedent's fall.* There is no contradiction of Wilds' positive testimony in the record, either direct or circumstantial. On the contrary, the circumstantial evidence, as will hereinafter be shown, confirms the testimony of Wilds.

(2)

The Summary Statement is Erroneous and Misleading As to the Nature and Character of the Trial Proceedings

The "Summary Statement of Matter Involved" is also erroneous and misleading as to what happened upon the trial of the case, wherein the following statement is made:

> "Upon motion of the defendant, the verdict was set aside upon the *sole* ground that it was contrary to the evidence, and final judgment was entered for the defendant."

In this connection, it is to be remembered that there was only one witness, and that one introduced by the plaintiff, *as to the single fact in issue, namely, whether the brakes were put on the train before or after the decedent's fall.* That witness was the locomotive engineer, Wilds, and he was the only known eye-witness to the accident, as above shown. We have also shown that Wilds testified, positively and unequivocally, that he *saw* the decedent fall or "tumble" from the footboard of the tender before the brakes were put on the train; *and that he personally applied the emergency brakes subsequent to and solely because of, the decedent's fall*—an action by Wilds which "humane feelings required", as stated in the opinion of the Court of Appeals (Appellee's Appx. 35).

In the memorandum opinion of United States District Judge Sterling Hutcheson, this is said (Appellant's Appx. 5):

> *"To sustain a verdict in this case it would be necessary to believe that the sudden stop was made before the plaintiff's decedent fell,* and *there is no evidence of any kind to support this contention."* (Italics supplied.)

After citing certain decisions of this Court, such as *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Lavender* v. *Kurn*, 327 U. S. 645 and *Tennant v. Peoria*, etc. R. Co., 321 U. S. 29, the opinion of the learned judge continues as follows:

> "* * * As I understand the cases, there must be shown some act or conduct from which it is reasonably possible to infer negligence.
>
> "Applying this test to the facts of the instant case, it is my opinion that *there is no evidence upon which the question of negligence* should have been submitted to the jury." (Italics supplied.)

In the opinion of the Court of Appeals, this is said (Appellee's Appx. 35):

> "We hold that the District Court correctly sustained Appellee's motion for a directed verdict. We find in the record no evidence sufficient to support an inference of any negligent act on the part of the engineer, or that his stopping the train caused Moore to fall."

And, again (Id. p. 38):

> "No fact was brought to light which could support an inference that the engineer stopped the train for any reason other than that which he gave in his testimony."

Consequently, the petition is not only plainly inaccurate but grossly misleading where it states that "Upon motion of the defendant, the verdict was set aside upon the sole ground that it was contrary to the evidence."

The impression the petition is evidently intending to convey is, that the trial court was "weighing the contrary

evidence, drawing inferences, judging the credibility of witnesses and drawing ultimate conclusions as to the facts, contrary to those drawn by the jury," (as stated generally in the petition pp. 2-3, under heading "Question Presented"). Nothing could be more misleading than this misstatement contained in the petition.

There was no evidence contrary to the testimony of plaintiff's own and sole witness (Wilds) as to the single fact in issue, namely, whether the brakes were put on the train before or after the plaintiff's decedent fell from the footboard of the tender; and Wilds testified that he personally put on the brakes after the decedent fell, as above shown. And the Court did not set aside the verdict upon the sole ground that it was contrary to the evidence, as stated in the petition. What the Court did was to direct a verdict for the defendant, *non obstante veredicto*, "acting pursuant to Rule 50 of the Federal Rules of Civil Procedure", on motions duly made by the defendant, on the ground that *"there is no evidence to support the plaintiff's allegation of negligence upon the part of the defendant."* (Italics supplied.)

This is conclusively shown by the judgment itself (Appellant's Appx. 6).

V

STATEMENT OF THE CASE

The opinion rendered by the Court of Appeals for the Fourth Circuit, contains an accurate summary of the essential facts established by the evidence, which statement we adopt for the respondent. The petitioner's brief contains no separate statement of the case. However, in the course of the petitioner's argument, particularly on pages 10, 19, 20 and 21 of her brief, various misstatements and incomplete

quotations of the evidence are made and repeated, and a number of unwarranted inferences are drawn therefrom. This makes it necessary to call attention to certain additional testimony not referred to in the Court's opinion.

Wilds' undisputed testimony is, as hereinbefore indicated, that the brakes were not put on the train until he saw Moore fall, and that he personally applied the brakes himself on account of and solely because of that fact (Appellee's Appx. 8, 10; Appellant's Appx. 26-27, 29); and that the train was going at a speed of only five miles an hour at the time of the accident. Nobody purported to say that any of this testimony was untrue.

Wilds also testified that Moore remained standing in the "same place", on the same footboard of the tender, from the time he gave the original back-up signal to start the train movement until he fell from the footboard (Appellee's Appx. 7-10, 12-13; Appellant's Appx. 21); that he himself "was leaning out" of the engine cab to see the switches ahead and "any signals which he (Moore) might give" (Idem). He said that Moore was *continuously* in his view up to the time he fell; that he could see "the edge of his shoulder and arm", and had no trouble keeping him in sight (Appellee's Appx. 12-14). He also verified that the man shown on the footboard in the picture, Defendant's Exhibit "B" (Appellee's Appx. 13-14; Original Record 145) taken facing the rear of the tender of No. 114, with himself in the cab, illustrated what was Moore's position on the footboard.

The testimony of this witness further showed that the movement of the train was in accordance with the regular routine of duty; that the cars had been pulled about ten carlengths in a westerly direction, during which time Moore had been occupying the customary position of a brakeman; that there had been no rough handling of the cars or jolting of the train; that a brakeman stands "on the edge of the

footboard" and "they give a signal, and you can see it; that "he has to get out in view where you can see his hand", and that "if he stood behind the tank where you couldn't see the signal, there would be no reason to give it" (Appellee's Appx. 7, 9; Appellant's Appx. 16, 23-24). He said that he (Wilds), in approaching No. 12 switch, could see that it was properly fixed for his movement into the ladder or lead track, and Moore had the same view (Appellee's Appx. 9, 10); that neither Moore nor anyone else, had given any signal to him to stop and nothing had happened to cause him to make any stop, until he saw Moore fall off (Appellee's Appx. 5, 8); that Moore was not giving any signal when he fell off, and there was no reason for him to be getting off, at that point (Appellee's Appx. 8); that the object of the train movement was to get the cars on the ladder track for switching purposes and he had expected to keep pulling the cars until he received a signal (Appellee's Appx. 5-6). He said it was not necessary for him to get any signal or "O.K." from a switch tender, or to give any notice to anyone, before coming out on the ladder track, and that he did not recall a switch tender or anybody being at the switch stand (Appellee's Appx. 15; Appellant's Appx. 30).

Wilds also testified that Moore, in falling from the footboard, came "tumbling off", "right at the step of the tender", on the outside of the rail, and "about six or eight inches from it." (Appellant's Appx. 26-28). He fell off at a point east of the switch, before the engine went through it (Appellee's Appx. 16).

Moore was thirty-two years of age. He had been brakeman and conductor for over six years (Appellant's Appx. 13-14). Wilds had been an engineer since 1929, and had worked with Moore on a number of other occasions at the Fulton Yards (Appellee's Appx. 5, 16).

Plaintiff's witness Torrence, upon being shown Defendant's Exhibit "B" (Appellee's Appx. 13-14; Original Record 145), the picture taken facing the rear of the tender of engine No. 114, with the man standing on the footboard holding to the handrail or grabiron, commented: "The man shown here is not balanced. * * * *He is holding onto the grabiron here.* Of course, he could stick out much further than that if he had chosen to lean out further, supporting himself by his arm." "He is supported by lateral force." He said that in the tests which he made, "we assumed" that a man on the footboard "would be balanced on his own two feet", and in an "upright" position (Appellant's Appx. 40-41, 44). He said nothing about whether such a man would hold to the handrail or grabiron, which an experienced man like Moore, acting in his line of duty, would naturally be doing, in order to be on the alert and "balanced", so as to give a signal from the moving train, if and when such a signal became necessary. Torrence admitted that he never operated an engine, and there was nothing to show that he had ever participated or had any experience in railroad yard switching operations (Appellee's Appx. 22). Had Moore been standing "upright" on the footboard, balanced "on his own two feet", as assumed by the witness Torrence—and it is merely a hypothetical assumption, since Torrence was not a witness to the evidentiary facts of the transaction, either direct or circumstantial—he would not have fallen outside the rail of the track, about six or eight inches therefrom (Appellant's Appx. 28), and at an angle thereto, as he did; but if he had been in such a position as assumed by Torrence, he would obviously have fallen between the rails of the track.

VI

SOME ASSERTIONS AND INFERENCES OF FACT IN PETITIONER'S BRIEF WHICH ARE CONTRARY TO AND UNSUPPORTED BY THE TESTIMONY

On pages 9, 20 and 21 of petitioner's brief, it is asserted that Moore "was standing behind the tender" on the footboard in such a position that Wilds could not see him, unless he "was reaching out from behind the tender giving a signal." This is directly contrary to Wilds' positive testimony that the edge of Moore's shoulder and arm were *continuously* in his view from the time he gave the back-up signal from the footboard, until he fell off.

It is also claimed on pages 10, 19 and 21 of petitioner's brief, that Moore could not give a signal, except when he was "reaching out from behind the tender" (i.e. as if from an unseen position). This too is contrary to the same evidence and to Wilds' testimony that a brakeman in such an assignment, "stands on the edge of the footboard", where he can see signals and from where his signals can be seen. Also in conflict with the same evidence, is the statement on page 17 of petitioner's brief, that "there is no evidence that Moore was standing in any such position", meaning the position of the man shown on the footboard in the picture, Defendant's Exhibit "B".

In seeking to find a possible cause for Wilds applying the emergency brakes (other than the fact that Moore was seen by him to have fallen off), the theory is suggested, on pages 19 and 21 of petitioner's brief, that Wilds, not knowing whether "they intended" to take all thirty-three cars out through the switch at one time, or "to stop and cut a part of them off," and not seeing a switch tender and not getting a signal from Moore, suddenly decided to make an emer-

gency stop to find out, and did so. Such a suggestion is directly contrary to the humane cause stated by Wilds. It also ignores both the fact that the movement being made was the first move with the engine coupled to the cars, and also Wilds' statement that he was intending "to keep pulling the cars back until I received a signal" and until he "cleared" the No. 12 switch and "probably beyond" (Appellee's Appx. 5-7, 15). It also disregards his statements that he did not have to get any signal from a switch tender or anyone at the switch; that there was nothing approaching from the opposite direction, and that he could see that the switch was properly lined for his engine. Furthermore, the act suggested would have been a most unnatural one for any experienced engineer during a normal switching movement.

The answer given by Wilds to the effect that Moore "was not in position to give him any signal if the switch was not in place", is twice cited on page 10 of petitioner's brief, as a condition applying to the entire period during which the back-up train movement was being made, a distance of some ten car lengths. However, the complete context of this question and answer (Appellee's Appx. 12-15), plainly shows that they relate only to the situation existing after Moore had fallen from the footboard. Wilds had already clearly stated in previous answers, how Moore remained in view and was in position, as was his duty, to give signals to him, if needed, while standing on the footboard, and had actually given the back-up signal from the very location (Appellee's Appx. 12-13). The manifest object at this stage of the questioning, was to ascertain whether there could be any reason for Wilds, in nearing the switch, to make an emergency stop, other than the fact of Moore's fall. And Wilds testified that there was no other reason. (The Complaint had alleged "a hitherto unprecedented and unexpected change in the manner of shifting cars, i.e., that a sudden stop was to be made

at the lead track", without warning to Wilds). Wilds did not say, as seems to be contended, that Moore was in a position of invisibility so far as he was concerned, but on the contrary, in a position where he could not give any signal. Certainly Moore was in that sort of position, when, lying outside of the rail and flat on his back, Wilds saw him and applied the emergency brakes. Had Moore been on the footboard but out of sight, Wilds would not know whether he could give a signal or not; and if in such position, he would have been absent from his post of duty, which not only cannot be assumed; but, in fact, the presumption is to the contrary, *Tennant* v. *Peoria, etc. R. Co.*, 321 U. S. 29, 34, 88 L. ed. 520, 524.

On pages 17 and 18 of petitioner's brief, a contention is made for the first time in this litigation, that defendant's picture, Exhibit "B", is "distorted"; that the view represented "was not correct", and was taken from an angle which "makes it appear that the engineer could see more than he could in fact see." The original record, as well as the Appendices used in the Court of Appeals, disclose no objection whatever to have been made to this picture in either court below. The picture shows on its face that it was taken from a position closely in line with the edge of the tender and in no sense enlarges the actual view of the engineer in the cab of Engine No. 114, the particular engine involved. Thus, only a number of projecting bolt or rivet heads are visible along the side of the tender, whereas had this picture been taken at an angle away from the track, the entire surface of the side of the tender would be disclosed. As reproduced and inserted between pages 16 and 17 of petitioner's brief, this exhibit is in the form of a "photolithograph", or a picture of a picture. Parts of it have been cut off in the foreground at the bottom and on both sides. It is misleading because it is not as clear and presents a smaller background

than the picture actually introduced. A print made directly from the original film, which is an exact duplicate of the picture as introduced at the trial and included in the original record at page 145, is therefore herewith inserted in the interest of accuracy.

On pages 14 and 15 of their brief, counsel for petitioner attempt to describe in detail certain alleged physical positions and demonstrations of the witness Wilds, while he was testifying before the trial court. In support of such description, they cite no evidence contained in the record, but offer only their own personal observation of what transpired. Manifestly, this is not legal proof, even though it is accompanied with an assertion that at that particular time, "Counsel did not lay hands upon him (Wilds) and press him straight down * * * and raise him straight up."

On page 31 of Appellant's Appendix it is indicated by a break in the testimony quoted, that the conductor, Luther Holland, was riding on the tender when the train movement began. This is incorrect, as is shown by the full quotation of this testimony on pages 6 and 7 of Appellee's Appendix.

VII

ARGUMENT

No Self-Contradiction Created by Answers of Witness Wilds to "Standing-Up-Straight" Questions

The foundation stone of the petitioner's entire argument is, that in the series of questions and answers quoted at the bottom of page 12 and top of page 13 of her brief, the witness Wilds, in acquiescing in her counsel's use of the phrase "standing up straight", as applied to Moore's position on the footboard when seen by him as the train moved along,

thereby contradicted himself completely, since the nearest edge of the footboard was ten inches inside the edge of the tender, and hence the conclusion may be drawn that Wilds could not see him at all until he had fallen off.

It will be recalled that Wilds did not claim to be able to see Moore's entire body, but only the edge of his shoulder and his arm. This was not enough of his body to affirm that he may not have been leaning more or less toward the left side. He did know that there was a handrail (grabiron) extending across the entire width of the tender, and that it was entirely appropriate for Moore to brace and support himself by means of this safety device—as indicated in the picture, Defendant's Exhibit "B". His answers to the questions should therefore be construed accordingly. Also, in the same series of questions, both the witness and counsel referred to the fact that Moore, just before falling, got in a "slumped" position, "as if his knees gave away"—as contrasted with his previous position when standing prepared to give a signal if needed. There was a difference between these two positions which was most significant to Wilds.

So far as concerns the candid admission made on page 15 of petitioner's brief that the "standing-up-straight" phrase was supplied and suggested entirely by her counsel's questions, had negative answers been given by Wilds to these questions, the same counsel would undoubtedly have protested that the witness was being unreasonably meticulous, arbitrary and over literal. Of course the witness was testifying as a practical railroad operating man, rather than as a precise physicist, mathematician, or expert on "semantics". The objection here, as pointed out in the opinion of the Court of Appeals, is not as to the words suggested, but to the "strained and forced interpretation" of them, "when they admit of a natural, ordinary colloquial construction", which the witness unquestionably had in mind in his assent

to their use by counsel. The self-contradiction sought to be inferred against the witness would be violative of fundamental principles of sound reasoning and just judgment. It involves the logical absurdity of trying to prove that Wilds could not see Moore by Wilds' own testimony that he could see him! And that, too, merely by a play upon words. Hamlet had this kind of "verbal gymnastics" in mind when examining a skull thrown up by a grave-digger, which he supposed to be that of a lawyer, asks—evidently with a layman's disapproval of such unfair technique—"Where be his *quiddits* now, his quillets, his cases, his tenures and *his tricks*?" No wonder therefore, the Court of Appeals calls attention to the disfavor with which the law looks upon such casuistry.

Thus, as stated by the Court of Appeals, the evidence of Wilds "fairly interpreted, shows, without contradiction, that he *could* see" Moore; and, accordingly, his testimony was in no wise self-contradictory.

The testimony of Wilds is not only uncontradicted by any evidence whatsoever, direct or circumstantial, but is corroborated by an undisputed fact, which when justly evaluated, confirms the testimony of Wilds to the effect that the catastrophe which befell Moore was the result of a *casus fortuitus* —an unforeseeable accident—and that, *specifically*, it was due to a heart condition, the serious nature of which was apparently unknown to any one, not even to Moore himself or his family.

This fact is referred to in the opinion of the Court of Appeals, where this is said:

> "Appellee with corroboration from appellant, who was examined as a witness in her own behalf, proved that Moore had suffered a coronary occlusion thirteen months before his death, which, in the opinion of the

attending physician at the time of treatment, was thought likely to recur. The physician who examined the body at the undertaker's establishment certified that death was due to the injuries sustained in the fall. No autopsy was made to determine whether there were signs of recurrence of the heart condition."

Again, the opinion of the Court of Appeals, in referring to the words "standing up straight", makes the following observations, the correctness of which are now admitted in the brief of the counsel for petitioner:

> "It is worthy of note that these were the words of counsel, and not of the witness. They were carefully framed, for no other apparent purpose than to provide an excuse to contradict the engineer's testimony."

The following citation from the opinion delivered by Hudgins, J. (now Chief Justice), in the case of *Butler* v. *Parrocha*, 186 Va. 426, 435, 43 S. E. (2d) 1, is peculiarly pertinent in this connection, where, after showing that the plaintiff's counsel knew that the witness' testimony would be adverse to the plaintiff's theory of the case, and, hence, could not claim they were surprised at the testimony of the witness, the court said (quoting with approval from the decision of Judge Hutcheson of the United States Court of Appeals, 5th Circuit, in *Young* v. *U. S.*, 97 F. (2d) 200, 117 A.L.R. 316):

> "'The overwhelming weight of authority, however, supports the rule that, though trial courts should in the exercise of a sound discretion to prevent injury from the surprise testimony of a hostile or corrupt witness, permit cross-examination and impeachment by contradictory statement, it is never permitted to make of the rule an artifice by which inadmissible matter may be

> gotten to a jury through the device of offering a witness whose testimony is known to be adverse, in order under the name of impeachment to get before the jury for its weighing favorable *ex parte* statements the witness has made."

The impropriety of the artifice is of course doubly applicable where the statements of the witness are not favorable to the party examining him at all, or can be held favorable only by "a strained and forced interpretation when they admit of a natural, ordinary colloquial construction."

The Fact That the Witness is Adverse to the Plaintiff Does Not Relieve the Plaintiff Of the Burden of Proof

Apart from the fact, as above shown, that the testimony of Wilds is in no wise discredited in this case, the Court of Appeals justly observes that the fact that Wilds was an employee of the appellee and a witness whom appellant was compelled to call to prove her cause, "did not relieve her from the burden of producing affirmative evidence from which an inference of negligence could be drawn."

In *Eckenrode* v. *Penn R. Co.*, 3rd Cir., 164 F. (2d) 996, aff'd. 335 U. S. 329, (cited in the opinion of the Court of Appeals), where all the plaintiff's witnesses were employees of the defendant and by leave of the trial court, put on the stand by the plaintiff as adverse witnesses, the Court stated in a footnote, that although the plaintiff was not bound by their testimony, yet "belief that testimony is false will not support an affirmative finding that the reverse of that testimony is true. Plaintiff has the burden of establishing his case by direct or circumstantial evidence; that burden is not met by pointing to the fact that all the available witnesses are hostile and will not testify in a manner which would support the complaint."

See also the cases therein cited, among them *Cruzan* v. *N.Y.C.&H.Riv. R.R.*, 227 Mass. 594, 116 N. E. 879, likewise a Federal Employers' Liability case.

In *Bunt* v. *Sierra Butte Gold Mining Co.*, 138 U. S. 483, 11 S. Ct. 464, 34 L. ed. 1031, a negligence case wherein the plaintiff had put on the witness stand the employees of the defendant company who were the only witnesses of the accident, the Court sustained the action of the trial court in directing a verdict for the defendant, and in an unanimous opinion, speaking through Mr. Justice Gray, the Court said:

> "The suggestion that because the only witnesses of the accident, and whom therefore the plaintiffs were compelled to call, were in the defendant's employ and might be prejudicial in its favor, the question how far they were biased should have been submitted to the jury, is of no weight. Theirs being the only testimony on the point, disbelief of their testimony could not supply a want of proof."

It is therefore not necessary to show in this case that Wilds was not put on the witness stand as an adverse witness by the plaintiff. Plaintiff's counsel made a motion for leave to do so, but the trial court acting in its sound discretion, overruled the motion of plaintiff's counsel to be allowed to treat the witness as an adverse witness "unless he were first shown to be adverse" (Appellee's Appx. 4); and the witness was never thereafter shown or claimed to be shown as an adverse or hostile witness by the plaintiff. Hence, plaintiff must be taken as having abandoned such a claim.

However, plaintiff's counsel was given the fullest liberty to treat the witness as an adverse witness and to cross-examine the witness by asking leading questions, even to the extent of putting "words in the mouth of the witness" as is

unequivocally confessed, and even defiantly proclaimed in the petition (p. 15). So that if Wilds came within the provisions of Rule 43(b) of the Federal Rules of Civil Procedure to the effect that "a party may interrogate any unwilling or hostile witness by leading questions," the appellant is in no position to complain of any restrictions in this respect, or in any other respect, in this case. Moreover, no such complaint is made in the petition.

It may not be amiss, however, to call attention to the fact that in the most recent case in Virginia on the subject, it is definitely indicated that the determination of such matters rest in the sound discretion of the trial court and that the Virginia and Federal rules on this subject are practically identical. See *Butler* v. *Parrocha*, 186 Va. 426 (1947), 43 S. E. (2d) 1, cited *supra*.

No Unfavorable Presumption from Alleged Failure of Defendant to Introduce Conductor Holland as a Witness

Apart from the fact that conductor Holland was not at the scene of the accident and was not an eye-witness thereto, no unfavorable inference against the defendant, as claimed in petitioner's brief (p. 22), can be drawn from the alleged failure of the defendant to introduce Conductor Holland as a witness, for the following reasons, and upon the following well-established grounds, to-wit: (1) No such inference can be allowed to arise where the plaintiff has not made out any prima facie case or any case at all; for the reason that such a presumption cannot be used to relieve the plaintiff of the burden of proving his case; and (2) Conductor Holland was summoned by the plaintiff and was present to testify as a witness "on behalf of the plaintiff" at the trial. See *praecipe* and subpoena with return thereon (Appellee's Appx. pp. 29-31).

(1)

No Prima Facie Case Made Out By The Plaintiff

The case of *Puckett* v. *Draper*, 158 S. E. 68, 156 Va. 238, cited at p. 22 of the petitioner's brief, was a case involving an alleged fraudulent conveyance, and in which the voluntary nature of the conveyance furnished a badge of fraud, and therefore established a prima facie case for the complainant.

A Virginia case more appropriate in this connection, is that of *Arnold* v. *Wood*, 173 Va. 18, 24, 3 S. E. 2d, 374, where on a demurrer to the evidence, in an automobile accident based on alleged negligence of the defendant, the Court said:

> "It is argued on behalf of the administratrix that, since the defendants failed to call the truck driver as a witness, there is a presumption that the latter was guilty of negligence. The answer is that until the plaintiff made out a prima facie case there was no duty on the defendants to bring forward any evidence or to call any witness on their behalf.
>
> "In *Hendricks* v. *Virginia Electric & Power Co.*, 161 Va. 793, 799, 172 S.E. 160, 162, we said:
>
> 'It is contended that presumptions unfavorable to the defendant exist because the motorman was not called as a witness. This rule does not apply where the plaintiff, bearing the burden of proof, which the law places upon him, has made out no case at all.
>
> 'There is no presumption against a defendant for failure to call witnesses when the plaintiff carrying the burden of proof has not made a prima facie case and such presumption cannot be used to relieve the plaintiff from the burden of proving his case.' "

See, to the same effect, 1 Jones on Evidence (Civ. Cas.) 4th ed., Sec. 22, p. 53; and 2 Wigmore on Evidence (3d ed.) Sec. 290, pp. 179-180.

(2)

Conductor Holland, a Witness in Behalf of Plaintiff

Since Conductor Holland was summoned by and present as a witness for the plaintiff, and since the burden of proof of negligence was upon the plaintiff, and since the plaintiff did not put him on the stand, if there is any adverse presumption at all arising from such circumstances, that presumption is plainly against the plaintiff. As in the case of, *In re King David,* we might quote the words of condemnation by plaintiff's counsel, contained on page 22 of petitioner's brief, and replying in the language of the prophet Nathan, justly observe: "Thou art the man!"

In 1 Jones on Evidence (Civ. Cas.) 4th ed., Sec. 21, p. 51, this is said:

> "An adverse inference does not arise from a failure to call as a witness one whom the other party had the same opportunity of calling."

See, also, 53 Am. Jur. 531; *De Pascale* v. *Penn. R. Co.,* 180 F. 2d, 825, 827.

Further comment seems unnecessary.

View

Where there is no evidence to support the plaintiff's case, as here, it is a favorite device of counsel for the plaintiff to claim that such deficiency is supplied by the view of the premises and property or instrumentalities involved, made

by the jury. This case, it appears, is no exception to the rule. Thus, it is said that "There was evidence which the jurors saw upon their own inspection" (petitioner's brief, p. 21); and that "Their verdict indicated the result of their own observations and tests" (Id. p. 20).

Since there is no pretension that there was any defect in the engine, tender or appliances connected therewith, and it is admitted, in effect, in the plaintiff's complaint that the defendant had furnished decedent a "position of safety" in which to work; since, further, detailed measurements of the engine and tender of Engine No. 114, were given by plaintiff's witness Torrence (Plaintiff's Exhibit No. 6, Appellant's Appx. 35-43); and since, still further, the plaintiff as well as the defendant, filed pictures of engine No. 114, in evidence (Appellant's Appx. 19), it is difficult to see how the jury, the Court, or the counsel, could have derived any greater information by a view than that which they already had. Cf. *C&O Ry. Co.* v. *Nickel*, 157 Va. 382, 161 S. E. 248; 64 C. J. Sec. 90, p. 89.

Again, by no possibility could a jury reasonably determine from a view of engine No. 114, whether decedent tumbled off the footboard of the tender prior or was thrown off subsequently to the application of the emergency brakes thereon, which is the sole question at issue in this case.

Moreover, the law is firmly established that a jury cannot base their verdict "on the result of their observations and tests" unsupported by the other evidence in the case, and the sworn testimony of witnesses.

Thus, in 2 Jones on Evidence (4th ed.), Sec. 408, p. 768, this is said:

> "Although a jury may properly act upon an inspection or view as evidence in the case, they are not justi-

fied in acting solely upon such evidence and in disregarding the other evidence; and if their verdict is not supported by the other evidence it cannot stand."

In 53 Am. Jur., subject Trial, Section 451, p. 354, after alluding to the divergence among the cases as to whether a view can be regarded as evidence or not, states that even the rule that the jurors may consider knowledge acquired by them on a view as evidence and act thereon accordingly is "subject to the qualification that such evidence by itself and in the absence of other evidence tending to sustain the issue is not sufficient to sustain a verdict or finding."

In the present case, the principle of law set out in the foregoing authorities has the added sanction of the trial court's ruling in setting aside the verdict of the jury and entering up judgment for the defendant in accordance with its motion for a directed verdict under Rule 50(b) of the Court.

VIII

AUTHORITIES

An examination of the cases relied upon in the petitioner's brief enforces the conclusion that not a single one discloses sufficient factual similarity as to have any bearing on the present case; the cases referred to being *Lavender* v. *Kurn*, 327 U. S. 645, 66 Sup. Ct. 740; *Gray* v. *Southern Pacific Company*, 145 P. 2d, 561; *Tennant* v. *Peoria etc. Ry. Co.*, 54 Sup. Ct. 409; *Kurimsky* v. *Unity Rys. Co.*, 55 A. 2d, 378; *Stanford* v. *Penn. R. Co.*, 171 F. 2d, 632.

In none of the foreging cases was there positive direct testimony of an eye witness of the accident, as in the case at bar, whose uncontradicted testimony showed that there was no negligence on the part of the defendant whatsoever. All

the foreging cases were cases of circumstantial evidence, in which the respective courts held that there was evidence from which it might reasonably be inferred that the defendant was guilty of negligence, and that such negligence was the proximate cause of the accident. In both of the U. S. Supreme Court cases, namely, *Lavender* v. *Kurn*, and *Tennant* v. *Peoria*, the trial courts had overruled motions by the defendants to direct a verdict, and entered up judgments for the plaintiffs. Here the trial court set aside the verdict and entered up judgment for defendant under Rule 50 of the Federal Rules of Civil Procedure, in accordance with the motions to direct a verdict duly made by the defendant. And such action of the trial court was affirmed by the Court of Appeals.

In all of the foregoing cases cited by the petitioner, there was evidence to show that the plaintiffs, or plaintiffs' decedents, were negligently injured by and through some agency or instrumentality of the respective defendants. Here there was no negligence at all, and no evidence from which any negligence might reasonably be inferred; the uncontradicted evidence showing that the fatal injury to the plaintiff's decedent was not occasioned by or through any agency or instrumentality of the defendant, but that the agencies and instrumentalities of the defendant were merely the conditions under which the decedent fortuitously fell from the footboard of the tender, as has been hereinbefore fully shown.

In short, there is but one single fact in issue in the present case, and that is whether the brakes were put on the train before or after the plaintiff's decedent fell; and (without weighing the credibility of witnesses, since there is no testimony by any other witness on that subject than the plaintiff's own witness, engineer Wilds) it is respectfully submitted, that there is in the evidence, no room whatever for an honest difference of opinion on that single, simple issue.

namely, that the brakes were not put on the train until Wilds saw the plaintiff's decedent fall; and that Wilds out of natural humanitarian motives, set the brakes in emergency himself, because of, and solely on account of the fact of the decedent's fall—a fact which took place before Wilds' own eyes and in the clear light of day; and concerning which there is not a scintilla of contradictory evidence, direct or circumstantial.

The argument contained in petitioner's brief (p. 25) that this Honorable Court, "commencing with *Tiller* v. *Atlantic Coast Line Company*, 318 U. S. 54, in a succession of cases has reversed almost every court which has held that a defendant was entitled to a directed verdict"; and (at p. 26), that "In view of the decisions of this Honorable Court, it is in fact difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict" —becomes weird in the light of the array of cases cited in the appendix to the concurring opinion of Mr. Justice Douglas, in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 72, 93 L. ed. 497, 510. Thirteen cases are therein cited wherein directions of verdicts by the lower courts were sustained on certioraris granted or refused; and all of them involved decisions rendered since the *Tiller case, supra*. One of such cases in which certiorari was denied (321 U. S. 763, 88 L. ed 1060) was the Virginia case of *Beamer* v. *Virginian Ry. Co.*, 181 Va. 650, 26 S. E. (2d) 43.

It seems therefore that the courts also have their "historic functions" to perform in their sphere of action in this class of cases, as well as in other negligence cases.

The attack by counsel for the petitioner on the Court of Appeals for the Fourth Circuit, in general (Petitioner's brief, p. 26); and the case of *Fore* v. *Sou. Ry. Co.*, 178 F. 2d. 349, in particular (Id. p. 27), is not only unjustified, but

also comes with ill grace from him, especially in view of the fact that he was counsel for the plaintiff in the *Fore case*, and applied for no certiorari to the Court's judgment in that case. The Court, in the said case, relied upon the decisions of the U. S. Supreme Court to support its judgment in sustaining the direction of the verdict for the defendant by the trial court.

The Court said (178 F. 2d, at p. 351):

> "The Supreme Court has made it crystal clear that under the Act the employer is not an insurer and that the injured employee can recover only upon proof of negligence on the part of the employer which is the proximate cause of the injury to the employee. Said Mr. Justice Black, in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 61:
>
> 'Much of respondents' argument here is devoted to to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability *only for negligent injuries*.' (Italics ours.)
>
> "See, also, *Myers* v. *Reading Co.*, 331 U. S. 477. In *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321 U. S. 29, 32-33, Mr. Justice Murphy stated:
>
> 'Petitioner was required to present *probative facts from which the negligence and the causal relation could reasonably be inferred. The essential requirement is* that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' *Galloway* v. *United States*, 319 U. S. 372, 395; *Atchison, T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351. (Italics ours.)"

IX

CONCLUSION

In conclusion, we respectfully submit that for the reasons herein set forth, no writ of certiorari should be granted the petitioner in this case, and, accordingly, the petition should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATRIX OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED,
Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A DOMESTIC CORPORATION,
Defendant.

On Writ of Certiorari To
The United States Court of Appeals
For the Fourth Circuit

BRIEF ON BEHALF OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY

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BRIEF ON BEHALF OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY

I

OPINIONS OF THE COURTS BELOW

(1) The opinion of the United States Court of Appeals for the Fourth Circuit appears at pages 86-91 of the record, and is also reported in 184 F. 2d 176.

(2) The opinion of the District Court of the United

States for the Eastern District of Virginia appears at pages 69-70 of the record.

For convenience, the parties will be hereinafter referred to as plaintiff and defendant.

II

SOLE QUESTION PRESENTED BY THE PETITION

The "sole question" presented, according to the Petition for Writ of Certiorari, is whether "the Courts below" (i.e. the District Court of the United States for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit) "*deprived petitioner of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, namely, a jury trial,* by weighing the contradictory evidence, drawing inferences, judging the credibility of witnesses, and drawing ultimate conclusions as to the facts, contrary to those drawn by the jury." (Italics supplied). See heading "C", page 2 of the Petition. A substantially similar statement appears on page 4 of plaintiff's brief, under the heading "Question Presented."

Under heading "D" of the Petition, p. 3, designated "Reasons Relied On For Allowance Of The Writ," the fact is emphasized that the right of "a jury trial" (as distinguished from a trial by the Court and jury) is the only question presented by the petition. We quote from the petition:

> "The United States Court of Appeals for the Fourth Circuit has rendered a decision in probable conflict with applicable decisions of the Supreme Court of the United States *involving the right of petitioner to a jury trial under the Federal Employers' Liability Act.*" (Italics supplied.)

So that the "sole question" presented in this petition, is whether the plaintiff is entitled to a jury trial under the Federal Employers' Liability Act, notwithstanding it may appear from the evidence as a matter of law, that any verdict rendered thereon for the plaintiff would be or is (as held in the present case by the two courts in question) not only contrary to the law and evidence, but without evidence whatsoever, direct or circumstantial, to support it.

Rule 38, paragraph 2 of this Court provides as follows:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

It will be noted that after specifically bringing forward the "right of the petitioner to a jury trial under the Federal Employers' Liability Act," as being the "sole question" presented, the petition goes on to state how the petitioner was "deprived" of the right by the "courts below," to-wit, "by weighing the contradictory evidence, drawing inferences, judging the credibility of witnesses and drawing ultimate conclusions as to the facts contrary to those drawn by the jury."

(1) If there could be language more abstract, more general and less specific than that last above-quoted from the petition, it is difficult to conceive what the language could be. In fact, it is respectfully submitted that the language is merely a "rhapsody of words" made over a "body of contraction"—that body of contraction being the alleged right of trial by a jury alone and not by court and jury as in all other negligence cases.

(2) Apart from the generality of the foregoing language, this unwarranted broadside against the trial court and the Court of Appeals for the Fourth Circuit, is annexed

as a relative clause, argumentative in character, relating only to the alleged means by which "the courts below deprived petitioner of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, namely a jury trial." (Petition p. 2).

(3) The general words contained in the foregoing quotation from the petition were taken largely from language used *arguendo* in *Lavender* v. *Kurn*, 327 U. S. 651, 652-653, and have no relevancy to the present case. The present case turns on the testimony of a single witness on a single, simple question of undisputed fact, and that witness being the plaintiff's (Petitioner's) own witness, all of which will be more fully shown below.

Thus, it appears that the only question "*specifically* brought forward by the *petition* for writ of certiorari" (Rule 38, par. 2, cited *supra*) is the alleged right of a "jury trial," without the intervention of the court, in any and all actions brought for damages by a railroad worker under the Federal Employers' Liability Act.

However, the right of a trial court to direct a verdict in a proper case in this class of cases, is not only settled by many recent decisions rendered by this Court; but this fact is conceded on page 32 of plaintiff's brief, as to a case in which there is "manifestly a woeful lack of evidence which could leave a jury nothing but speculation."

(1) In the first place, it will be noted that the exception mentioned in the plaintiff's brief, is not contained in the "Sole question presented" in the petition; and that Rule 38, par. 2, above cited, provides that only the question specifically brought forward by the *petition* for writ of certiorari will be considered.

(2) In the second place, despite the assertion in the plaintiff's brief to the contrary, the present case comes

within the very exception mentioned in the brief, where the court may take the case away from the jury, namely, where there is an utter lack of evidence to support the conclusion reached. That there was a complete absence of any evidence to support the plaintiff's case, was upon mature deliberation definitely adjudicated by the District Court, and on appeal therefrom to the Court of Appeals for the Fourth Circuit, this judgment of the District Court was affirmed as being "clearly right." Moreover, such a conclusion will, we submit, be convincingly established by an examination of the record.

In fact, the plaintiff's brief itself indicates a consciousness of the justice inherent in the decisions of the two courts below and the unassailable character of their conclusions. Otherwise, there would be no occasion (a) for the misstatements, as well as unsupported inferences of fact contained in the plaintiff's brief, as will be hereinafter shown; and (b) The plaintiff has abandoned her contention, as she was logically and authoritatively compelled to do, made at page 26 of her brief accompanying the petition for writ of certiorari—that "negligence and proximate cause," are in this class of cases treated as exclusively questions for the jury; that on these issues "its decision is unassailable," and that it would be "difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict." On the contrary, it is now admitted by the plaintiff in her last brief, at page 20, (quoting with approval from Mr. Justice Frankfurter's opinion in *Johnson* v. *U. S.*, 333 U. S. 46, 54):

> "A trial is not a game of blind man's buff. . . . Federal Judges are not referees at prize fights but functionaries of justice."

III

SINGLENESS AND SIMPLICITY OF THE QUESTION INVOLVED AND NATURE OF THE PROCEEDINGS IN THE COURTS BELOW

The plaintiff's Complaint alleged only one specific ground of negligence, namely, that the plaintiff's decedent, while acting as brakeman for the defendant in a yard switching movement and located "in a position of safety on the rear of the tender" of a locomotive, was caused to be thrown to the ground by the sudden application of the brakes in emergency, in a "hitherto unprecedented and unexpected change in the manner of shifting cars," and without proper warning or signal to the decedent, who was thereby fatally injured (R. 2).

An additional general allegation of negligence "in other respects and particulars," was stricken by the Court from the Complaint, on defendant's motion, after plaintiff had elected not to furnish a more definite statement of such negligence (R. 3, 7). There was no allegation of any negligence with respect to the footboards on the locomotive tender, or as to the brakes, or any other appliances or appurtenances connected with the locomotive or group of cars attached to it. And no violation of any safety appliance acts is in any way involved in this case.

Defendant's answer denied any negligence on its part; denied that the decedent was thrown off the tender by any application of the engine brakes; denied there was any change made in the manner of shifting cars, or that any sudden stop was made while decedent was on the tender. It averred that the decedent, as an experienced brakeman, had full knowledge of the engine movements being made and the physical situation, and further averred that his

injuries were solely due to an accident which could not have been reasonably foreseen or anticipated by the defendant, etc. (R. 4-6).

That the sole question on which the case was submitted by the Court to the jury (under Rule 50 of the Federal Rules of Civil Procedure), was the single specific issue indicated above, is shown by the concluding portion of the trial court's charge, to which there was no objection or exception by either party, where the court said (R. 65):

> "The issue which you have before you is very narrow. It boils down to this: If you believe from the evidence that Mr. Moore was thrown from the tender as the result of the sudden stop or violent jerk which resulted from the unexpected application of the brakes, then you may conclude that the defendant railroad Company is liable for negligence. On the other hand that is the only charge of negligence contained in the Complaint. Unless you believe that, your verdict should be for the defendant."

The plaintiff, on pages 2 and 3 of her brief, admits the above to be the sole issue in the case.

Only one person testified as to how the decedent was injured and the circumstances surrounding it. He was the locomotive engineer (Wilds), the only eye-witness to the accident. He was put on the stand by and testified as a witness for the *plaintiff*; and not even as an adverse witness, as is stated in the petition (R. 18).

Wilds' testimony was unequivocally and emphatically, not only to the effect that *the brakes did not go on the locomotive and train until after the plaintiff's decedent fell, but that he personally saw the plaintiff's decedent fall, and applied the brakes himself subsequent to, and solely because of, the decedent's fall*—an action by Wilds which "humane feelings

required," as stated in the opinion of the Court of Appeals (R. 88). There is no contradiction of Wilds' positive testimony in the record, either direct or circumstantial. On the contrary, the circumstantial evidence, as will hereinafter be shown, fully confirms the testimony of Wilds.

In the memorandum opinion of United States District Judge Sterling Hutcheson, this is said (R. 70):

> "To sustain a verdict in this case it would be necessary to believe that the sudden stop was made before the plaintiff's decedent fell, *and there is no evidence of any kind to support this contention.*" (Italics supplied).

After citing certain decisions of this Court, such as *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Lavender* v. *Kurn*, 327 U. S. 645 and *Tennant* v. *Peoria, etc. R. Co.*, 321 U. S. 29, the opinion of the learned judge continues as follows:

> "* * * As I understand the cases, there must be shown some act or conduct from which it is reasonably possible to infer negligence.
>
> "Applying this test to the facts of the instant case, it is my opinion that *there is no evidence upon which the question of negligence should have been submitted to the jury.*" (Italics supplied).

In the opinion of the Court of Appeals, this is said (R. 88, 91):

> "We hold that the District Court correctly sustained Appellee's motion for a directed verdict. We find in the record no evidence sufficient to support an inference of any negligent act on the part of the engineer, or that his stopping the train caused Moore to fall. It is elementary that mere proof that an accident occurred affords no basis for an inference that it was caused by

> negligence * * *. To warrant an inference of negligence, appellant must have proved that the emergency stop was begun *before* Moore fell. This she failed to do."
>
> * * *
>
> "No fact was brought to light which could support an inference that the engineer stopped the train for any reason other than that which he gave in his testimony."

Consequently, the plaintiff's brief at page 4, under the heading "Question Presented", is not only inaccurate but grossly misleading, where it states that the courts below, "had to weigh contradictory evidence, draw inferences, judge the credibility of witnesses, and draw ultimate conclusions as to the facts, contrary to those drawn by the jury."

There was no evidence, either direct or circumstantial, contrary to the testimony of plaintiff's own and sole witness (Wilds), as to the single fact in issue, namely, whether the brakes were put on the train before or after the plaintiff's decedent fell from the footboard of the tender, and Wilds testified that he personally applied the brakes after the decedent fell, as shown above.

IV

STATEMENT OF THE CASE

The opinion rendered by the Court of Appeals for the Fourth Circuit contains an accurate summary of the essential facts established by the evidence, which statement we adopt for the defendant. However, in the plaintiff's "Statement of the Case," as well as in the course of the argument presented in her behalf, various misstatements of the evidence are made and repeated, and a number of unsupported inferences are sought to be drawn therefrom. We cannot

therefore accept the plaintiff's statement of the evidence and facts, and hence find it necessary to restate portions of the evidence, and to call attention to certain additional testimony not referred to in the Court's opinion or in the plaintiff's statement.

Wilds' undisputed testimony was, as hereinbefore indicated, that the brakes were not put on the train until after he saw Moore fall, and that he personally applied the brakes himself on account of and solely because of that circumstance (R. 28, 32, 33). Nobody purported to say that this testimony was untrue.

Wilds also testified without contradiction, that Moore, while "standing" on the footboard of the tender, gave him the original back-up signal to start the train movement, and that he remained standing in the "same place", on the same footboard, until he fell from that footboard (R. 22, 31, 35); that he himself was "leaning out" of the cab window, looking west, "to see if the switch were properly lined and there was anything on the lead-track", and to "see any signals he (Moore) might give" (R. 30, 35); that Moore was facing forward with his back toward him continuously (R. 33); that it would have been Moore's duty to have given a signal if a train had been coming from the opposite direction, but no such signal was required (R. 22, 32); that "the edge of his (Moore's) shoulder and arm" were *continuously* in his (Wilds') view up to the time he fell," during which time he had no trouble keeping him in sight (R. 35).

Wilds also verified that the man shown on the footboard in the photograph taken from a point facing the rear of the tender of engine No. 114, with himself leaning out of the cab window (Defendant's Exhibit B), was in "the same position about", as had been occupied by Moore (R. 35-36, 82). He said that a brakeman in Moore's assignment, stands "on the edge of the footboard", where he gives a "call back

signal with his hand," and "you can see it;" that "he has to get out in view where you can see his hand," and "if he stood behind the tank where you couldn't see the signal, there would be no reason to give it" (R. 24-25).

The evidence of this witness further showed that the train was going at a speed of only five miles an hour; that this particular movement was the first move of the engine with the cars, and was in accordance with the regular routine of duty, the cars having been pulled about ten car lengths in a westerly direction, with Moore occupying the customary position of a brakeman (R. 33, 37); that there had been no rough handling of the cars or jolting of the train, to cause Moore to fall (R. 33); and that the object of the move was to get the cars on the ladder track preparatory to switching them (R. 31). In accordance with custom, the air had been "bled" out of the air brakes on the 33 cars, making it easier to move them around in switching (R. 32).

Wilds also testified that in approaching the No. 12 track switch leading into the ladder track, he could see that it "was properly lined for my movement" (R. 33); that he works "by signals," and was expecting to "keep pulling the cars on back" until he received a signal (R. 30, 34); that neither Moore nor anyone else had given him any signal or any instructions to stop, and there was no reason to make a stop, until after he saw Moore fall from the footboard (R. 32, 38), and that there wasn't any reason for Moore to have gotten off the footboard before the engine reached the switch (R. 32). He also said that he did not recall seeing a switch tender or anyone around the switch; that it was not necessary for him to get a signal or "OK" from a switch tender or anybody at the switch stand before coming out on the ladder track (R. 30, 36-37), and that Moore's fall occurred east of and before the tender reached the switch stand (R. 38).

Wilds stated that when he saw Moore fall, he "did everything I could to stop as quick as *I could*"; that he "shut off the throttle," put the brakes in emergency, turned on the sand and "threw the reverse bar in," and that from the time Moore "slumped", "it all happened within a couple of seconds" (R. 33-34). He further said he gave no warning that he was going to apply the brakes, after he saw Moore fall, because he didn't have time, and it was much more important to stop as quickly as he could (R. 36).

The other circumstances connected with the accident fully corroborate the testimony of engineer Wilds.

The weather was fair; and, as the accident thus happened in the daytime of a clear autumn day, about 3:50 P.M., on September 25, 1948, there was nothing in the weather conditions to interfere with the vision of engineer Wilds. And there was nothing to cause the plaintiff's decedent to fall on account of such or any other conditions brought home to the knowledge of the defendant, by which such an occurrence could reasonably have been foreseen or anticipated. That the grab-irons, handrail and footboards on the tender were in a good condition, is not questioned. Indeed this fact is confirmed—by the testimony of plaintiff's witness, Torrence, and by the further fact that there was not only no negligence charged as to the condition of the defendant's said appliances, or any other appliances; but the Complaint itself affirmatively avers that the defendant's locomotive was caused suddenly to apply its emergency brakes, "thereby causing the decedent to be thrown from a *position of safety on the rear of the tender of said locomotive.*" (Italics supplied). "A position of safety" can mean nothing else than that the defendant had furnished plaintiff's decedent a safe place to work on the rear of the tender of said locomotive, the place from which the decedent fortuitously fell at the time of the accident.

Plaintiff's decedent was an experienced brakeman, who had been promoted to conductor, but was braking at the time of the accident. He had been working for the defendant "pretty close to seven years". He was therefore thoroughly familiar with the work he was doing and the method by which it was being done (R. 12).

The way in which the decedent fell—he first "slumped", and in the next instant raising himself up, tumbled "head foremost", making a complete "somersault", "doubled up", landing on the ground "right up beside the rail of the track" on the back part of his head and shoulder, with his feet lying in a westwardly position at a kind of an angle to the track—shows in itself with reasonable certainty, that the decedent's fall was caused by something that happened to him internally and not by anything of an extraneous character. It was not what happened outside the decedent that caused him to fall, but what happened inside him (R. 26, 27, 40).

Considering the fact that the train was going only five miles an hour; that the decedent was of light weight (around 140 pounds) and small stature (about 5 feet, four and one-half inches in height); that he was in a "position of safety" (as alleged in the Complaint) holding to a safe handhold on the tender of the engine to which was attached a safe footboard, leaning out far enough for Wilds to see the edge of his shoulder; that he was only 32 years of age; that he was active enough and strong enough to have done similar work before in the same way, and appeared to have been in "real good health" and "real good spirits" before going to work that very day, as testified to by the plaintiff (R. 13, 14); that the train went the length of the engine and tender, a box car and part of another car, after the brakes were put on (R. 23)—all these circumstances would seem to indicate that, in all human probability, the putting on of the

brakes would not have caused the decedent to fall at all, the train not going faster than a man can walk, and the stop being gradual. Certainly, under the foregoing circumstances, if the decedent had been thrown off the tender on account of the sudden application of the brakes, he would not have turned a somersault and landed on his head, but his whole body would have been propelled forward; and, young as he was, and of undoubted agility as shown by his occupation, he would have jumped far enough outside the track to have landed on his feet in a safe position, or else run faster than the train was going until he got to a position of safety.

The testimony of Wilds is still further corroborated by a striking circumstance, developed in the evidence. This evidence confirms the fact testified to by Wilds, that the catastrophe which befell the decedent was the result of a *casus fortuitus*—an unforeseeable accident—and that specifically, it was due to a heart condition, the serious nature of which was apparently unknown to anyone, not even to Mr. Moore himself or his family. Mrs. Moore (the plaintiff) testified, as above stated, that he appeared to be in "real good health" and "real good spirits" when he left for work the afternoon of the accident. Also Wilds testified that when the deceased arrived at the Fulton Yards on that occasion, he seemed to be in good health and that he noticed nothing "unusual" about his appearance.

It is a matter of common knowledge that heart attacks frequently come at times when the patients appear to be in the best of health; and, hence, such unpredictable attacks are not capable of being foreseen or estimated. Accordingly, there is a maxim of the law in such cases, which reads as follows:

"*Casus fortuitus non est sperandus et nemo tenetur divinare.* 4 Co. 66—A fortuitous event is not to be foreseen, and no person is held bound to divine it." 2 Bouv. L.D. (Rawles Rev.) p. 347.

Within a year before the accident, on October 3, 1947, plaintiff's decedent had a heart attack, the nature of which was fully described by Dr. Kinloch Nelson, a witness for the defendant (R. 55-58).

The testimony of Dr. Nelson as to the heart trouble of the plaintiff's decedent is substantially confirmed by the testimony of the plaintiff herself (R. 13).

If, as the testimony shows, the decedent had suffered a thrombosis in one of the major arteries of his heart within a year before the accident and took a month to six weeks to recover therefrom; if he fainted at the time of the first attack; if he was more likely to have such a heart attack again than one who had never had such an attack, and should have "taken it easy" thereafter,—in the absence of any evidence to the contrary, can any reasonable person say that the decedent did not suddenly slump and fall from the footboard of the tender at the time of the accident, as testified to by engineer Wilds?

The foregoing circumstantial evidence is, we respectfully submit, not only consistent with the direct testimony of Wilds; but the circumstantial evidence alone, taken as a whole, is *inconsistent* with the theory of the plaintiff that the decedent was thrown off the tender by the sudden application of the brakes on the engine or train, which is the sole ground of negligence alleged in the Complaint.

The testimony of the plaintiff's witness Torrence, who was not a witness as to the facts of the accident, will be hereinafter referred to.

V

NATURE OF ARGUMENT PRESENTED IN PLAINTIFF'S BRIEF

The major contention of the plaintiff, as set forth on page 2 of her brief and repeated in substance at pages 7 and 37, is that there was evidence adduced on her behalf that "tended to show", that while Moore was standing on the footboard of the engine tender in the performance of his duties as brakeman, the engineer applied the emergency brakes to the engine, without warning, and thereby caused Moore to fall from the footboard.

It is conceded on pages 4, 18 and 37 of plaintiff's brief, that Wilds himself (admitted to be "the key witness"), actually testified that he could see Moore in the position which he occupied, standing on the footboard, and that he did not apply the brakes to the engine until after he saw Moore had fallen off and because of that fact. It is nevertheless argued on behalf of the plaintiff on pages 4, 9, 10, 18, 19 and 37 of her brief, that by reason of "several admissions" allegedly made by Wilds with respect to Moore's exact position on the footboard and certain other physical facts in the evidence, there was a self-contradiction, and the jury could find that it was "impossible" for him to have seen Moore on the footboard at all, immediately before the accident, and hence he did not see Moore until after he had fallen from the footboard, and that this was after the brakes had been applied.

Wilds, as we have seen, was the plaintiff's own witness. In no event should the testimony of a witness be twisted and tortured from its fair construction, or any part thereof torn from its context, so as to give the testimony a meaning which it would not otherwise possess; and least of all by the party who put him on the witness stand and hence

avouched his credibility. To be sure, a party may rely on the testimony of any witness whose testimony is in his favor; but he cannot distort the testimony into favorability by a misrepresentation thereof, or by the process of fragmentation.

As stated by Lord Erskine during the sedition trials of the 1790s, in adopting such a method of citation, one could prove from the Bible that "There is no God," simply by leaving out of the reference the statement, the fool said this in heart.

VI

ARGUMENT

No Self-Contradiction Created By Answers of Witness Wilds To "Standing-Up-Straight" Questions

The chief claim advanced in support of the alleged contradiction of the witness Wilds is, that after in direct examination, he had answered ten or more inquiries of plaintiff's counsel as to where and how Moore stood on the footboard, his duties and his means of signaling with his hand, he acquiesced in her counsel's use of the phrase "standing-up-straight," in two later questions, as applied to Moore's position and movements while the train was moving and before the brakes were applied (R. 25-26). Without any such narrow or specialized meaning being brought to the attention of the witness, it is now asserted that he thereby affirmed that Moore was standing in an exact perpendicular and plumb line position on the footboard, which fact could not have been true, because the outside edge of the footboard was ten inches inside the edge of the tender and in such a location he would be out of Wilds' range of vision.

It will be recalled that Wilds did not claim to be able to see Moore's entire body, but only "the edge of his shoulder

and arm" (R. 35). This was not enough of his body to enable him to affirm that Moore may not have been leaning more or less toward the left side. He expressly recognized in a related question, that he could not see the edge of the footboard on which Moore stood, since it was "short" of the engine and tender (R. 27). He did know that there was a handrail (grabiron) extending across the entire width of the tender, and that it was entirely appropriate for Moore to brace and support himself by means of this safety device installed for such a purpose—as indicated in the picture, Defendant's Exhibit "B". His answers to these questions should therefore be construed accordingly. Also, in the same series of questions, both the witness and counsel referred to the fact that Moore, just before falling, got in a "slumped" position, "as if his knees gave away"—as contrasted with his previous position when standing prepared to give a signal if needed. Here was a difference between positions which was of most significance to Wilds.

The opinion of the Court of Appeals, in referring to the words "standing-up-straight," makes the following observations, the correctness of which are now admitted in the brief of counsel for the plaintiff (R. 90):

> "It is worthy of note that these were the words of counsel, and not of the witness. They were carefully framed, for no other apparent purpose than to provide an excuse to contradict the engineer's testimony."

So far as concerns the candid admission made on pages 12 and 13 of plaintiff's brief, that the "standing-up-straight" phrase was supplied and suggested entirely by her counsel's questions, had negative answers been given by Wilds to these questions, the same counsel would undoubtedly have protested that the witness was being unreasonably meticulous, arbitrary and over literal. Of course the witness was

testifying as a practical railroad operating man, rather than as a precise physicist, mathematician, or expert on "semantics." The words were not inappropriate to the situation. Moore was certainly "standing up," so as to have the general characteristics of a straight line (2 Webster's New International Dictionary, Second Edition, 1939, page 2488), and in a position in which Wilds was accustomed to see a brakeman stand, when performing such an assignment as Moore was performing. He was at full height—not crouched.

The objection here, as pointed out by the Court of Appeals, is not as to the words suggested; but to the "strained and forced interpretation" of them, "when they admit of a natural, ordinary colloquial construction," which the witness unquestionably had in mind in his assent to their use by counsel. The self-contradiction sought to be inferred against the witness would be violative of fundamental principles of sound reasoning and just judgment. It involves the logical absurdity of trying to prove that Wilds could not see Moore, by Wilds' own testimony that he could see him! And that, too, merely by a verbal quibble. Hamlet had this kind of "verbal gymnastics" in mind when examining a skull thrown up by a grave-digger, which he supposed to be that of a lawyer, asks—evidently with a layman's disapproval of such unconscionable technique—"Where be his *quiddits* now, his *quillets*, his cases, his tenures and his *tricks*?" No wonder therefore, the Court of Appeals calls attention to the disfavor with which the law looks upon such casuistry (R. 90).

Thus, as stated by the Court of Appeals, the evidence of Wilds "fairly interpreted, shows, without contradiction, that he *could* see" Moore; and, accordingly, his testimony was in no wise self-contradictory.

In referring to defendant's photograph, Exhibit "B", which was used by Wilds in illustrating the way Moore was standing, the witness Torrence said (R. 46):

"The man shown here is not balanced. *We assumed that a man would be balanced on his own two feet. He is holding onto the grab iron here. Of course, he could stick out much further than that if he had chosen to lean out further supporting himself by his arm.*'" (Italics supplied).

* * * *

Q. In what position did *you* place him (i.e. person on the footboard) before *you* made *your observation—standing upright?*

A. *Standing upright,* his foot on the edge of the step, which was ten inches from the edge of the tender.

Q. A man *standing straight?*

A. *Upright, straight,* I could not see him when I put my head out of the side window." (Italics supplied).

The foregoing testimony shows there is no conflict whatsoever between Torrence's testimony and Wilds' testimony. Torrence conceded that if Moore was standing as illustrated in defendant's Exhibit "B", the decedent could have been seen by Wilds; and *Wilds testified that Moore was standing as was indicated in that picture.* Furthermore, Torrence's testimony was based upon the assumption that the man on the footboard was standing *upright,* "balanced on his own two feet." And all through his testimony, he recognized that the word "upright" was the technically correct word for the situation to which he referred; and not the word "straight." Even when his counsel asked him the leading question as to the man being "standing straight?", he first said "upright" before adding the word straight. The way Moore fell *outside the rail* of the track demonstrates the correctness of Wilds' positive testimony as to the way he was standing. Had Moore been standing "upright" on the footboard "balanced on his own two feet," as assumed by the witness Torrence—and it is merely a hypothetical assumption, since Torrence was not a witness to the evi-

dentiary facts of the transaction, either direct or circumstantial—he would obviously have fallen *between the rails of the track.*

It is worthy of observation that the propriety of Moore's position while standing on the footboard, in holding to the handrail or grab-iron—which was the natural and proper position for a brakeman acting in his line of duty, in order to be on the alert and "balanced" so as to give a signal from the moving train if and when such a signal became necessary—is not disputed by Torrence. In fact, Torrence frankly admitted that he had never operated an engine, and there is nothing in the record to show that he had ever participated, or had any experience, in railroad yard switching operations (R. 48-49).

Other Unwarranted Inferences Sought To Be Drawn From Wilds' Testimony

On pages 9 and 10 of the plaintiff's brief, it is asserted that Wilds made various statements concerning other circumstances, which show that he could not have seen Moore on the footboard at the time he tumbled off.

Thus it is claimed that Wilds admitted that he couldn't see Moore on the footboard or any signal he might give, except when Moore was giving such a signal by "reaching out from behind the tender." At no time was any such statement or admission made by Wilds.* On the contrary, as

*As to this argument, see opinion of Judge Hutcheson where this is said (R. 70):

> "It is argued in behalf of the plaintiff that the engineer could not have seen the decedent before he fell. If this is correct it does not weaken the defendant's case. There was no evidence of any obstruction or other reason for the engineer to apply the brakes until he saw the decedent fall and certainly there is no evidence whatever that the engine was brought to a stop before this occurred."

already shown, Wilds stated positively that the edge of Moore's left shoulder and arm were *continuously* in his view (R. 35), and that Moore was facing forward in the "same position," from the time the train movement started to the moment he began to "slump" (R. 33). It was in answer to plaintiff's counsel's own inquiry as to what "motion" and what "movement" did Moore make while still standing on the footboard, that Wilds said "he started to slump", and thereafter tumbled off (R. 25-26). Of course a brakeman on a footboard, with his back to an engineman, has to reach out or extend his arm in some direction in order to give a signal with his hand, otherwise his own body may well obscure his signal. But this does not mean that a part of his shoulder and arm could not already be in view, as Wilds distinctly said they were in this instance. As Wilds reiterated, the essential thing is for the brakeman *to get out in view himself*, where he could see signals as well as give them. Moore was in such a position and remained there (R. 24-25, 35).

It is also claimed on page 10 of plaintiff's brief, that the fact that Wilds testified (R. 22) that Moore was not giving any signal at the time of the accident, was another "admission" or "contradiction" on his part to the effect that he could not see Moore at that time. We are unable to follow counsel's basis of reasoning for this assertion—since the very opposite would logically appear to be true.

It is further claimed on page 10, as a contradiction, that Wilds said that Moore was not in position to give him any signal, "immediately before the accident." The complete context (R. 35-37) of the question and answer referred to (R. 37), plainly shows that they relate only to the situation existing after Moore had fallen from the footboard. Wilds had already clearly stated in various previous answers, how Moore remained in view and was in position, as was his

duty, to give signals to him, if needed, while standing on the footboard—the original back-up signal having been given from that very location (R. 31, 35). The inquiry here was, and Wilds so construed it, whether there could have been any reason for him to make an emergency stop, other than the fact of Moore's fall. And Wilds testified there was no other reason. He had seen that the switch point and track ahead were clear (R. 30, 33). (The Complaint had alleged "a hitherto unprecedented and unexpected change in the manner of shifting cars, i.e., that a sudden stop was to be made at the lead track," without warning to Wilds). Wilds did not say, as seems to be contended, that Moore at this stage was in a position of invisibility, so far as he was concerned, but on the contrary, in a position where he could not give any signal. Certainly Moore was in that sort of position, when, lying outside of the rail and flat on his back, Wilds saw him and applied the emergency brakes. Had Moore been on the footboard but out of sight, Wilds would not know whether he could give a signal or not; and if in such position, he would have been absent from his post of duty, which not only cannot be assumed; but, in fact, the presumption is to the contrary. *Tennant* v. *Peoria, etc. R. Co.*, 321 U. S. 29, 34, 88 L. ed. 520, 524.

Also on page 10, as well as on page 19, of plaintiff's brief, it is claimed that Wilds contradicted his statement that he could see Moore standing on the footboard as he says he did, because "notwithstanding" he observed him "slump straight down and straighten himself up," "he did nothing." But this disregards Wilds' narrative statement that Moore "slumped" and "righted himself and all in a second's time he came tumbling head foremost * * * off the engine," as well as his subsequent answer that "it all happened within a couple of seconds" (R. 27, 34). Manifestly, there wasn't time to have stopped the train after Moore "slumped." A

premature effort to have done so, might well have endangered him in his place of safety, instead of aiding him. Besides, this contention is diametrically opposed to the sole allegation of negligence contained in the plaintiff's Complaint, and demonstrates the inexorable futility of the plaintiff's claim. The Complaint alleges that the defendant's negligence consisted in applying the brakes before the plaintiff's decedent fell: the contradictory position is here and now for the first time taken (without either evidence or allegations to support it) that defendant's negligence consisted in not applying the brakes before the plaintiff's decedent fell.

It is further claimed on page 10 of plaintiff's brief, that the fact that the engine and 33 cars, proceeding at a five mile per hour speed when the brakes were applied, stopped as soon as they did, "without air pressure on the cars behind," also contradicts Wilds. Apparently, the argument at this point is, that Wilds, in trying "to stop as quick as I could," acted too promptly and effectively—a unique complaint, and therefore must have applied the brakes earlier than he claimed. In any event, there was no evidence offered at the trial in support of any argument that the stop actually made, couldn't have been made in the manner recited and within the distance stated—none whatsoever.

It is also claimed on page 10, as well as page 12, of plaintiff's brief, that Wilds contradicted himself in another manner, namely, by making a demonstration in court, at counsel for the plaintiff's request, of how Moore slumped, straightened up and thereafter tumbled off of the engine. In support of such assertion, no evidence in the record is cited, and reliance is placed solely on counsel's own description *dehors* the record of what transpired. Obviously, this is not legal proof, even though it be accompanied with an avowal that "there is no evidence that counsel laid hands upon him and

pressed him straight down, or * * * raised him straight up." Nor was a grabiron provided for the witness.

In seeking to find a possible explanation for Wilds' applying the emergency brakes (other than the fact that Moore was seen by him to have fallen off), it is suggested on page 18 of the plaintiff's brief, that the jury could infer that Wilds, "not seeing a switch tender or anyone else around the switch" and "not seeing Moore on the footboard (since he was not reaching out giving a signal)", and not knowing whether "*they intended*" to take all of the thirty-three cars out through the switch at one time or stop and cut some of them off, "decided to make an emergency stop," and did so, to get this information.

Such a suggestion as to an experienced engineer, is utterly fanciful and unreasonable on its face. It disregards Wilds' emphatic statements, "I work by signals," and that he intended to "keep pulling the cars on back until I received a signal," until he cleared the switch, and "probably beyond" (R. 30). It likewise ignores his testimony that he did not have to get any signal from a switch tender or anyone at the switch stand, and that nothing was approaching from the opposite direction. To be remembered, also, is the fact that the movement then being made was the first move with the engine coupled to the cars since the crew came on duty (R. 37).

On pages 15 to 17 of plaintiff's brief, a contention is made for the first time in this litigation, that defendant's photograph, Exhibit "B", is "distorted"; that the view represented "was not correct", and was taken from an angle which "makes it appear that the engineer could see more than he could in fact see." The record discloses no objection whatever to have been made to this picture in either court below. The picture shows on its face that it was taken from a position closely in line with the edge of the tender and in no sense enlarges the actual view of the engineer in the cab

of Engine No. 114, the particular engine involved. Thus, only a number of projecting bolt or rivet heads are visible along the side of the tender, whereas had this picture been taken at an angle away from the track, the entire surface of the side of the tender would be disclosed. As reproduced and inserted between pages 14 and 15 of plaintiff's brief, this exhibit is in the form of a "photolithograph", or a picture of a picture. Parts of it have been cut off in the foreground at the bottom and on both sides. It is not as clear and presents a smaller background than the picture actually introduced. A photograph made directly from the original film, which is an exact duplicate of the picture introduced at the trial, and included in the original record at page 145, is therefore herewith inserted in the interest of accuracy.

The Fact That The Witness Is Adverse To The Plaintiff's Case Does Not Relieve The Plaintiff Of The Burden Of Proof.

Apart from the fact, as above shown, that the testimony of Wilds is in no wise discredited in this case, the Court of Appeals justly observes that the fact that Wilds was an employee of the defendant and a witness whom the plaintiff was compelled to call to prove her cause, "did not relieve her from the burden of producing evidence from which an inference of negligence could be drawn."

In *Eckenrode* v. *Penn. R. Co.*, 3rd Cir., 164 F. (2d), 996, aff'd. 335 U. S. 329, (cited in the opinion of the Court of Appeals), where all the plaintiff's witnesses were employees of the defendant and by leave of the trial Court, put on the stand by the plaintiff as adverse witnesses, the Court stated in a footnote, that although the plaintiff was not bound by their testimony, yet, "belief that testimony is false will not support an affirmative finding that the reverse of that testi-

mony is true. Plaintiff has the burden of establishing his case by direct or circumstantial evidence: that burden is not met by pointing to the fact that all the available witnesses are hostile, and will not testify in a manner which would support the complaint."

See also the cases therein cited, among them *Cruzan* v. *N.Y.C. & H. Riv. R.R.*, 227 Mass. 594, 116 N.E. 879, likewise a Federal Employers' Liability Act case.

In *Bunt* v. *Sierra Butte Gold Mining Co.*, 138 U. S. 483, 11 S. Ct. 464, 34 L. ed. 1031, a negligence case wherein the plaintiff had put on the witness stand the employees of the defendant company who were the only witnesses of the accident, the court sustained the action of the trial court in directing a verdict for the defendant, and in an unanimous opinion, speaking through Mr. Justice Gray, the Court said:

> "The suggestion that because the only witnesses of the accident, and whom therefore the plaintiffs were compelled to call, were in the defendant's employ and might be prejudicial in its favor, the question how far they were biased should have been submitted to the jury, is of no weight. Theirs being the only testimony on the point, disbelief of their testimony could not supply a want of proof."

In *Texas & N.O. R. Co.* v. *Grace* (1945) (Texas), 188 S.W. 2d, 378, plaintiff's decedent was killed, while sitting on a railroad track, by a freight train of the defendant. The negligence relied on was the alleged discovered peril of the decedent by the enginemen on the defendant's locomotive, in time to have averted the injury.

The Court said (at p. 380):

> "The point at which the deceased was struck was 133 feet north of the north line of Church Street. The train

was brought to a stop 429 feet beyond the point where the brakes were applied. The explanations given by the fireman and the engineer were reasonable, but since they were interested witnesses, the respondents would have us discard their testimony altogether. For the purposes of this opinion we may do so, but to discard the testimony of a witness on the ground that he is an interested witness does not authorize a Court to believe the opposite of what it imports. The fact that the testimony of an interested witness is not accepted as evidence in his favor does not operate to convert it into evidence against him."

No Unfavorable Inference From Alleged Failure Of Defendant To Introduce Conductor Holland As A Witness.

(1)

Apart from the fact that (1) Conductor Holland was not at the scene of the accident and *was not an eye-witness thereof*, and without any direct knowledge in regard thereto, no unfavorable inference against the defendant, as claimed in plaintiff's brief (p. 22), can be drawn from the alleged failure of the defendant to introduce Conductor Holland as a witness, for the following additional reasons, and upon the following well-established grounds, to-wit: (2) No such inference can be allowed to arise where the plaintiff has not made out any case at all; for the reason that such a presumption cannot be used to relieve the plaintiff of the burden of proving his case; and (3) Conductor Holland was summoned by the plaintiff and was present to testify as a witness "on behalf of the plaintiff" at the trial. See *praecipe* and subpoena with return thereon (R. 8-10).

(2)

No Unfavorable Inference Applicable Unless Prima Facie Case Made Out By The Plaintiff

The Virginia case of *Puckett* v. *Draper*, 158 S.E. 68, 156 Va. 238, cited at page 22 of the plaintiff's brief, was a case involving an alleged fraudulent conveyance, and in which the voluntary nature of the conveyance itself furnished a badge of fraud, and therefore established a prima facie case for the complainant.

A Virginia case directly in point in this connection, is that of *Arnold* v. *Wood*, 173 Va. 18, 24, 3 S.E. 2d 374, where on a demurrer to the evidence, in an automobile accident case, based on alleged negligence of the defendant, the Court said:

> "It is argued on behalf of the administratrix that since the defendants failed to call the truck driver as a witness, there is a presumption that the latter was guilty of negligence. The answer is that until the plaintiff made out a prima facie case there was no duty on the defendants to bring forward any evidence or to call any witness on their behalf.
>
> "In *Hendricks* v. *Virginia Electric & Power Co.*, 161 Va. 793, 172 S.E. 160, 162 we said:
>
> 'It is contended that presumptions unfavorable to the defendant exist because the motorman was not called as a witness. This rule does not apply where the plaintiff, bearing the burden of proof, which the law places upon him, has made out no case at all.
>
> 'There is no presumption against a defendant for failure to call witnesses when the plaintiff carrying the burden of proof has not made a prima facie case and such presumption cannot be used to relieve the plaintiff from the burden of proving his case.'"

See, to the same effect, 1 Jones on Evidence (Civ. Cas.) 4th ed., Sec. 32, p. 53; and 2 Wigmore on Evidence (3d ed.) Sec. 290, pp. 179-180. A contrary ruling, as pointed out by Prof. Wigmore and other authorities, would change the whole law as to the burden of proof.

The case of *Woods, Housing Expediter* v. *Graf*, 84 F. Supp. 893, cited in plaintiff's brief, p. 20, an action by the housing expediter to recover for rent overcharge, the defendant contended that by agreement with Blaisdell (the tenant) and his wife, the premises were rented for commercial purposes and were so used during the tenancy, and hence the premises involved were not subject to the regulations of the housing and rent act. Otherwise, Blaisdell would have been entitled to a refund of the overcharge. Blaisdell, however, failed to testify as to the agreement, and gave no reason for such failure.

Fole , District Judge, said:

> "In weighing the evidence I also lend great importance to the unexplained absence of Robert Blaisdell and his failure to testify in contradiction *to the proof of the defendant.*" (Italics supplied).

Blaisdell was the real party plaintiff in the case. Since a prima facie case against him had been made out by his opponent, his silence as to the agreement, without explanation, was held by the Court to be evidence of the most persuasive character against him. The other cases cited in this connection were similar cases, wherein individual parties to the suit were involved who failed to testify, in the face of adverse testimony in opposition to their contentions, and hence similar rulings were made. They are *Kirby* v. *Tallmadge*, 160 U. S. 379, 40 L. ed. 463, cited in *Cooper* v. *Dashey*, 290 U. S. 106, 78 L. ed. 203; *Bilokumsky* v. *Tod*,

263 U. S. 149, 68 L. ed. 221 and *Runkle* v. *Burnham*, 153 U. S. 216, 38 L. ed. 694.

The principles laid down in the foregoing cases are brought out in clear relief in the case of *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, 52, 72 L. ed. 137, 151, commonly known as the "Teapot Dome" case. The suit was to cancel an oil and gas lease made by the United States to the Mammoth Oil Company. The Complaint alleged that the lease and agreement were made without authority of law and in consummation of a conspiracy to defraud the United States. H. F. Sinclair was the principal representative of the Company. He failed to testify in the case. The government introduced evidence sufficient to make out a prima facie case, without putting Sinclair upon the witness stand. The Court said:

> "*Having introduced evidence which, uncontradicted and unexplained, was sufficient to sustain its charge*, the United States was not required to call the principal representative of the Company. His silence makes strongly against the Company. It is as if he personally held the lease, were defendant, and failed to testify. * * * *While Sinclair's failure to testify cannot properly be held to supply any fact not reasonably supplied by the substantive evidence in the case* (*Northern R. Co.* v. *Page*, 274 U. S. 65, 74, 71 L. ed. 929, 933, 47 Sup. Ct. (Rep. 491), it justly may be inferred that he was not in position to combat or explain *away any fact or circumstances so supported by evidence and material to to the government's case*" (Italics supplied), citing, among other cases, *Runkle* v. *Burnham*, *Kirby* v. *Tallmadge*, and *Bilokumsky* v. *Todd*, *supra*, referred to in plaintiff's brief p. 20.

(3)

Conductor Holland a Witness in Behalf of Plaintiff

Since Conductor Holland was summoned by and present as a witness for the plaintiff, and since the burden of proof of negligence was upon the plaintiff, and since the plaintiff did not put him on the stand, if there is any adverse inference at all arising from such circumstances, that inference is plainly against the plaintiff.

In 1 Jones on Evidence (Civ. Cas.) 4th ed., Sec. 21, p. 51, this is said:

> "An adverse inference does not arise from a failure to call as a witness one whom the other party had the same opportunity of calling."

To the same effect is 53 Am. Jur. 531.

In *De Pascale* v. *Penn. R. Co.*, 180 F. 2d 825, where there was a verdict and judgment for the defendant, in an action by a conductor for personal injuries under the Federal Employers' Liability Act, the Court said (at p. 827):

> "Appellant's second point is a complaint against the defense for not calling track foreman Beaver as a witness. There is no substance to this. Beaver did not see the accident. Appellant claims that his knowledge of the condition of the yard was important. If so, his testimony could have been obtained without any real difficulty, especially as other evidence was actually taken on appellant's side of the matter in Ashtabula prior to trial. Beaver was present during the early stages of the trial. Request could have been made to the Court to insure his presence throughout the proceedings. He could have been subpoenaed while in Philadelphia."

Realizing that the plaintiff has not made out a case, plaintiff's counsel (at pages 20-21 of plaintiff's brief) in

effect now makes the unprecedented request, for the first time in his *brief* (not in her *petition*) in this court, for a new trial. He quotes from the opinion of Mr. Justice Frankfurter, in the admiralty case of *Johnson* v. *United States*, 333 U. S. 46, to the following effect:

> "Instead of entering judgment for *the party who had the burden of proof and did not meet it*, (Italics supplied), the Trial Judge should at least have called Dudder (co-worker) as the Court's witness."

Counsel then adds the following comments:

> "The plaintiff thought she had made out a case for the jury without calling the conductor. The Judge evidently thought so, because he submitted the narrow issue squarely to the jury. If the Judge changed his mind after the jury had drawn the inference of negligence, the Common law required him to award a new trial in setting aside the verdict of the jury *so that the plaintiff might call Holland or introduce expert testimony that the engineer could not possibly have stopped the train as quickly as he did*," etc. (Italics supplied).

In the first place, the Judge did not change his mind. He expressly submitted the case to the jury, *with his reservation of his right to rule on defendant's motion to direct a verdict for the defendant*, in accordance with Rule 50 of the Federal Rules of Civil Procedure.

In the second place, Conductor Holland was already in court, summoned as a witness for the plaintiff at the time of the trial. Setting aside the verdict and granting the plaintiff a new trial, under such circumstances, "so that the plaintiff might call Holland" as a witness, would be uncalled-for and expensive trifling with the dignity, the majesty, and

orderly procedure of the Court; and, it is respectfully submitted, nothing short of a travesty upon justice. See *Galloway* v. *U.S.*, 319 U.S., 372, 393.

The same observations may be made as to the request for the alleged opportunity "to introduce expert testimony" to supply the thus admitted insufficiency of evidence for the plaintiff. In addition to Conductor Holland, the yardmaster of the Fulton yard and one other member of the yard crew were summoned by the plaintiff to testify in her behalf, namely, Oscar P. Enroughty, yardmaster, and W. R. Gibson, brakeman (R. 8-9), and although all were present at the time of the trial, none of them was put upon the witness stand by the plaintiff.

The foregoing facts and admissions, we respectfully submit, in themselves point up to an unequivocal confession by the plaintiff's counsel that the plaintiff has failed to "make out a case."

Further comment seems unnecessary.

View

Where there is no evidence to support the plaintiff's case, as here, it is a favorite device of counsel for the plaintiff to claim that such deficiency is supplied by the view of the premises and property or instrumentalities involved, made by the jury. This case, it appears, is no exception to the rule. Thus, it is said at pages 11 and 19 of plaintiff's brief, that the jurors were shown the engine involved (No. 114) and made their own observations and tests, and their verdict indicates the result.

Since there is no pretension that there was any defect in the engine, tender or appliances connected therewith, and it alleged in the plaintiff's Complaint, that the defendant had furnished decedent a "position of safety" in which to work; since, further, detailed measurements of the engine and

tender of engine No. 114, were given by plaintiff's witness Torrence, Plaintiff's Exhibit No. 6, (R. 80); and since, still further, the plaintiff as well as the defendant, filed pictures of engine No. 114, in evidence, it is difficult to see how the jury, the Court, or the counsel, could have derived any greater information by a view than that which they already had. Cf. *C&O Ry. Co.* v. *Nickel*, 157 Va. 382, 161 S.E. 248; 64 C.J. Sec. 90, p. 89.

Again, by no possibility could a jury reasonably determine from a view of engine No. 114, whether decedent tumbled off the footboard of the tender prior or was thrown off subsequently to the application of the emergency brakes thereon, which is the sole question at issue in this case.

Moreover, the law is firmly established that a jury cannot base their verdict "on the result of their observations and tests" unsupported by the other evidence in the case, and the sworn testimony of witnesses.

Thus, in 2 Jones on Evidence (4th ed.), Sec. 408, p. 768, this is said:

> "Although a jury may properly act upon an inspection or view as evidence in the case, they are not justified in acting solely upon such evidence; that if their verdict is not supported by the other evidence it cannot stand."

In 53 Am. Jur., subject Trial, Section 451, p. 354, after alluding to the divergence among the cases to to whether a view can be regarded as evidence or not, states that even the rule that the jurors may consider knowledge acquired by them on a view as evidence and act thereon accordingly is "subject to the qualification that such evidence by itself and in the absence of other evidence tending to sustain the issue is not sufficient to sustain a verdict or finding."

VII

AUTHORITIES

An examination of the cases relied upon in the plaintiff's brief enforces the conclusion that not a single one discloses sufficient factual similarity as to have any bearing on the present case; the cases referred to being *Lavender* v. *Kurn*, 327 U. S. 645, 66 Sup. Ct. 740; *Gray* v. *Southern Pacific Company*, 145 P. 2d, 561; *Kurimsky* v. *Unity Rys. Co.*, 55 A. 2d, 378; *Eglsaer* v. *Scandrett*, 151 F. 2d, 562; *Tennant* v. *Peoria, etc. R. Co.*, 321 U. S. 29, 64 Sup. Ct. 409.

In none of the foregoing cases was there positive direct testimony of an eye witness of the accident, as in the case at bar, whose uncontradicted testimony showed that there was no negligence on the part of the defendant whatsoever. All the foregoing cases were cases of circumstantial evidence, in which the respective courts held that there was evidence from which it might reasonably be inferred that the defendant was guilty of negligence, and that such negligence was the proximate cause of the accident.

In all of the foregoing cases cited by the plaintiff, there was evidence to show that the plaintiffs, or plaintiffs' decedents, were negligently injured by and through some agency or instrumentality of the respective defendants. Here there was no negligence at all, and no evidence from which any negligence might be inferred, either by any officers, agents or employees of the defendant, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works or other equipment.

In short, there is but one single question in the present case, and that is whether the brakes were put on the train before or after the plaintiff's decedent fell. And without weighing contradictory evidence, drawing inferences, and

judging the credibility of witnesses (since there is no testimony by any other witness on that subject than the plaintiff's own witness, engineer Wilds, and from it no contradictory inferences can be drawn therefrom), or drawing ultimate conclusions as to facts within the legitimate province of the jury, it is respectfully submitted, that there is in the evidence, no room whatever for an honest difference of opinion on that single question, namely, that no brakes were put on the train until Wilds saw the plaintiff's decedent fall; and that Wilds, out of natural humanitarian motives, set the brakes in emergency himself, because of, and solely on account of the fact of the decedent's fall—a fact which took place before Wilds' own eyes and in the clear light of day; and concerning which there is not a scintilla of contradictory evidence, direct or circumstantial.

In the case of *Eglsaer* v. *Scandrett*, 151 F. 2d. 562, cited in the plaintiff's brief at pages 31-32, the negligence of the defendant was not disputed as having been established by the special verdict of the jury. The only question involved in that case, which was one of circumstantial evidence, was whether such negligence (a defective bell-ringer) was the proximate cause of the injury. The Court of Appeals (7th Cir.) overruled the trial court's action in sustaining the motion of the defendant to change the answer of the jury in favor of the plaintiff on the inquiry as to whether such negligence was the proximate cause of the injury; and the Court of Appeals said that, while the evidence gave them "pause" as to whether the jury's finding, as to such negligence being the proximate cause of the fatal injury to the plaintiff's decedent, was not objectionable on the ground of allowing speculation to do duty for probative facts, they were "somewhat influenced" in reaching their conclusion by the holding in the case of *Tennant* v. *Peoria, etc. R. Co.*, 321 U. S. 29, which was likewise a case of circumstantial

evidence wherein negligence was established and the whole case turned on the question of proximate cause—a question not involved in the present case, since here the case is utterly void of any evidence of negligence.

The Court cited that part of the *Tennant case*, relating to proximate cause which is quoted in the plaintiff's brief, pp. 31-32, but also added the following citation from the *Tennant case*, accurately and lucidly setting forth the principles governing the decisions in negligence cases, but which citation is omitted in the plaintiff's brief:

> "* * * It was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. * * * Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked' ".

The case of *Gray* v. *Southern Pacific Company*, 145 P. 2d. 361, cited in plaintiff's brief at pages 21-25, was likewise a case of circumstantial evidence, in which there was great conflict in the testimony both on the question of negligence and proximate cause, and hence presented a question of contradictory evidence as to the facts, the determination of which fell peculiarly within the province of a jury's functions.

The citation from the opinion of the Court contained at p. 24 of plaintiff's brief to the effect that—

> "They (i.e. the jury) could reject positive testimony and accept circumstantial evidence as proof of the facts, as it is elementary that direct evidence may be dis-

> believed and *contrary* (emphasis added) circumstantial evidence relied upon to support a verdict of finding"—

is an affirmation of the fact that the circumstantial evidence must be *inconsistent* with the direct testimony in such a case. If the circumstantial evidence, as in the present case, is consistent with the direct testimony, then as indicated by the foregoing citation, it is insufficient to support a finding contrary to the direct testimony.

At page 25 of the plaintiff's brief, the following citation is made from the case of *Kurimsky* v. *Unity Rys. Co.*, 55 A. 2d 378, wherein a brakeman was killed during switching operations when he was jolted off one of the cars as a result of engineer making sudden stop of the train to throw a caboose, without advising the brakeman of the change of orders for a switching movement:

> "The Court submitted to the jury whether 'there was a sudden jerk or jolt or jar of this train which threw Kurimsky from the train and to the tracks in such manner as to cause his death?' The Judge also said, *'If there was no sudden or unusual jerk or jolt of any kind, then of course there is no negligence in this case and the plaintiff's case falls.'*" (Italics supplied).

The above ruling of the Court is, we respectfully submit, a direct holding in favor of the defendant in the present case, and that for two reasons:

The uncontradicted evidence shows, (1) there was no sudden or unusual jerk or jolt of any kind prior to the brakeman's fall, and (2) the brakes were not put on the train until after the fall of the plaintiff's decedent.

In *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. ed. 916, suit was brought by Lavender, Administrator of the Estate of Haney, under the Federal Employers' Liability Act, against

the St. Louis-San Francisco Railway Company (Frisco), and the Illinois Central Railroad Company, in the Circuit Court of the City of St. Louis, Missouri. It was charged that Haney, while employed as a switch-tender by the defendants in the switchyard of the Grand Central Station in Memphis, Tennessee, was killed as a result of the defendants' negligence. There was a verdict and judgment for the plaintiff in the trial court, which on appeal by the defendants was reversed by the Supreme Court of Missouri. On certiorari, the judgment of the Supreme Court of Missouri was reversed, and the judgment of the trial court was affirmed as against both defendants.

As against the Frisco, it was held that the evidence was sufficient to support a verdict for the plaintiff for the death of the switch-tender, found near the track with a fractured skull, shortly after he had thrown a switch to permit a passenger train to back into its station, where it was shown that there was a mail hook hanging down loosely on the outside of the mail car of the backing train, and considering the height and swing out of the hook, the existence of an uneven mound of cinders and dirt near the track, on which the deceased was probably standing when hit, and the nature of the deceased's duties, it was a fair inference that he had been struck on the back of the head, although there was contrary evidence indicating that he could not possibly have been hit by the hook, and it was possible that he might have been murdered. As against the Illinois Central, it was held that the defendant had negligently failed to furnish the decedent a safe place to work.

The Court said (327 U. S. 649):

> "Both east and west of the switch, however, was an uneven mound of cinders and dirt rising at its highest points 18 to 24 inches above the top of the rails. Witnesses differed as to how close the mound approached

the rails, the estimates varying from 3 to 15 feet. But taking the figures most favorable to the petitioner, the mound extended to a point 6 to 12 inches north of the overhanging side of the mail car. If the mail hook end swung out 12 to 14 inches it would be 49 to 55 inches above the highest parts of the mound. Haney was 67½ inches tall. If he had been standing on the mound about a foot from the side of the mail car he could have been hit by the end of the mail hook, the exact point of contact depending upon the height of the mound at the particular point. His wound was about 4 inches below the top of his head, or 63½ inches above the point where he stood on the mound—well within the possible range of the mail hook end."

And at pages 652-653:

"We hold, however, that *there was sufficient evidence of negligence on the part of both the Frisco trustees and the Illinois Central* to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury. (Italics supplied).

The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney in the back of the head, an inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be

unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury.

It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring ~~that the~~ hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

Moreover, the Court added the following statement (at p. 653):

> *"Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."* (Italics supplied).

(a) The case at bar, as has been abundantly shown, comes within the very terms of the last-mentioned statement of the law contained in the cited case. There is a complete absence of *probative facts* to support the verdict of the jury in the present case, and, as said in the case of *Tennant* v. *Peoria, etc. R. Co., supra*, "The essential requirement is that mere speculation be not allowed to do duty for probative facts."

(b) There was no eye-witness to the accident in the cited case. The traditional, historic and familiar test for determining whether the case was one for the jury was adopted by both appellate courts, namely, whether the evidence was sufficient for a reasonable person (i.e. the ideal reasonable

person of the law) to hold that the defendants were guilty of negligence and that such negligence was in whole or part the proximate cause of the accident. The divergence between the Supreme Court of Missouri and this Honorable Court was in the application of the said test. The Supreme Court of Missouri held that the evidence was insufficient to satisfy the foregoing test. This Court—after a full consideration and a just and painstaking evaluation of the evidence—held the contrary. This Court said:

> "* * * The inference that Haney was killed by the hook cannot be said to be unsupported by probative facts, or to be so unreasonable as to warrant taking the case from the jury."

Hence, in the case at bar, the learned and able trial judge, the Honorable Sterling Hutcheson, after citing the foregoing cases of *Lavender* v. *Kurn*, and *Tennant* v. *Peoria*, *supra*, said in his opinion, and it is worthy of repetition in this connection:

> "* * * As I understand the cases, there must be shown some act or conduct from which it is reasonably possible to infer negligence. Applying this test to the facts of the instant case, it is my opinion that there is no evidence upon which the question of negligence should have been submitted to the jury."

(c) In the present case, there is positive, direct, and uncontradicted testimony of an eye-witness—the only eye-witness to the accident—who was put on the stand as a witness for the plaintiff. He was the locomotive engineer, Wilds. As has been stated before, Wilds testified positively, unequivocally and emphatically, not only to the effect that the brakes were not put on the locomotive and train until after the plaintiff's decedent's fall, but that *he personally*

saw the plaintiff's decedent fall, and applied the brakes himself subsequent to, and solely because of the decedent's fall.

As to the fact of Moore's fall from the footboard, Wilds' testimony was thus (to use the language of Cicero, the most modern of ancient logicians, when he told the judges that his witness proved that Archias his client had been enrolled as a citizen of Heraclea), not that he *thought it*, but that *he knew it;* not that he had *heard of it*, but that he *saw it*—and, as to the fact of the brakes not having been put on until after Moore's fall, Wilds' testimony is not merely that he was present when this was done, *but that he did it himself.*

And as to the foregoing testimony of Wilds, the Court of Appeals says in its opinion (R. 91):

> "No fact was brought to light which could support an inference that the engineer stopped the train for any other reason than that which he gave in his testimony."

Finally, it is contended by the plaintiff that the Seventh Amendment of the Constitution of the United States, as interpreted by the case of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1912), prohibits a direction of verdict by Federal Courts. Surely, this contention is nothing less than sheer desperation. Mr. Justice VanDeventer, who delivered the majority opinion of the Court in the *Slocum case*, in the case of *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 79 L. ed. 1636, speaking for the unanimous Court, shows that the plaintiff has completely misunderstood the nature of the decision in the *Slocum case*; and that, in fact, the *Slocum case* is a definite authority against the plaintiff's contention; that the *Slocum case* had merely decided that where the trial court had submitted the case to the jury *without reservation* of the question of the sufficiency of the evidence, on a motion to direct a verdict (which was overruled by the trial court), the appellate court could not set aside the ruling of the trial court in failing to direct a verdict

for the defendant and itself determine the issues of fact and direct a judgment for the defendant; but, under the Seventh Amendment, the direction should have been for a new trial.

In the *Redman case* this is said (pp. 658-659):

> "A very different situation is disclosed in the present case. The trial court *expressly reserved its ruling on the defendant's motions* to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. *Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court.* The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings. No objection was made to the reservation or this mode of proceeding, and they must be regarded as having the tacit consent of the parties." (Italics supplied).

The entire question under discussion was fully considered, determined and seemingly foreclosed in the recent case of *Galloway* v. *U. S.*, 319 U. S., 372, 87 L. ed. 1458 (1943), and in footnote 30 of the majority opinion, this is said:

> "We have not given special consideration to the latest decisions touching the Amendment's effects in the different situations where a verdict has been taken, on the one hand, *without reservation of the question* of the sufficiency of the evidence, Slocum v. New York L. Ins. Co., 228 U. S. 364, 57 L. ed. 879, 33 S. Ct. 523, Ann. Cas. 1914 (D) 1029, and, on the other hand, *with such* a reservation, Baltimore & C. Line v. Redman, 295 U. S. 654, 79 L. ed. 1636, 55 S. Ct. 890. Cf. Ætna Ins. Co. v. Kennedy, 301 U. S. 389, 81 L. ed 1177, 57 S. Ct. 809. Whatever may be the exact effect of the latter and, more recently, of Rule 50 of the Federal Rules of Civil Procedure upon the former decision, it suffices to say that, notwithstanding the sharp division engendered in the Slocum case, there was no disagreement in it or in the Redman case concerning the validity of the practice

of directing a verdict. On the contrary, the opinions make it plain that this was unquestioned and in fact conceded by all." (Italics supplied).

In the present case, the Court expressly submitted the case to the jury subject to the reservation of the Court's determination of the question of the sufficiency of the evidence under Rule 50 of the Federal Rules of Civil Procedure, as to which reservation and procedure there was no objection by the plaintiff. (R. 60, 71).

Furthermore, the contention in question, now made on behalf of the plaintiff, was not only not made in the trial court, or the Court of Appeals, but it was not presented in the petition for writ of certiorari to this Honorable Court.

VIII

CONCLUSION

In conclusion, it is submitted, that for the reasons herein set forth, the judgments entered by both the District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit were plainly right, and that the judgment of the latter Court should therefore be affirmed.

Respectfully submitted,

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